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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, CLC,

Petitioner,

v.

PHILLIP R. POPE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the administrative issuance of a membership withdrawal card to a discharged union employee who no longer meets any membership eligibility criteria established by the union's constitution constitute "expulsion" or "discipline" under § 411(a)(5) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(5)?

2. May a discharged appointed union employee who is no longer eligible to be a member of the union after his job has ended, challenge his termination on the theory that it was a violation of his "membership rights" under Title I of the LMRDA, 29 U.S.C. § 411 et seq., despite this Court's holding in *Finnegan v. Leu*, 456 U.S. 431 (1982), that appointed union employees have no cause of action to challenge their discharge under Title I?

3. Once a claim under LMRDA Title III, 29 U.S.C. § 464, challenging the validity of a trusteeship over a local union has been declared moot because the trusteeship has been dissolved, may the same issues be tried under Title I by an individual union employee seeking damages for actions taken against him by the trustee, or should Title III be the exclusive cause of action for challenging the existence of a trusteeship?

4. Even assuming the law allowed a trusteeship to be tested in a Title I proceeding, does the jury in such a case have the authority to make findings of a violation of Title III of the LMRDA?

PARTIES

The Petitioner is the Office and Professional Employees International Union, AFL-CIO (OPEIU), a labor organization. Petitioner was defendant in the District Court and Appellant in the Court of Appeals. Pursuant to Rule 29.1, this labor organization has no parents or subsidiaries.

Respondent is Phillip R. Pope, who was one of the plaintiffs in the district court and the only appellee in the Court of Appeals.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Thompson v. OPEIU*, 74 F.3d 1492 (6th Cir. 1996). It is reproduced as Appendix A to this Petition at 1a - 38a.[1] The Order and opinion of the United States District Court for the Eastern District of Tennessee denying Petitioner-Defendant's motion for Judgment NOV and/or for a new trial and to set aside the punitive damages award is unreported and is reproduced at Cert Pet. App. B, 39a - 73a.

JURISDICTION

The 2-1 decision of the U.S. Court of Appeals was entered on February 8, 1996. Petitioner moved for rehearing *en banc* on February 20, 1996. On April 17, 1996, the Court of Appeals entered an order denying the petition for rehearing. Cert. Pet. App. C, 74a-75a. Petitioner requested an extension of time for filing a Petition for a Writ of Certiorari, and on June 28th Justice Stevens extended the time for filing the instant Petition to September 14, 1996. Cert. Pet. App. 76a. This Court has jurisdiction to review the final judgment of the U.S. Court of Appeals pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

This case involves several provisions of the Labor Management Reporting and Disclosure Act (LMRDA), also known as the Landrum-Griffin Act. Respondent Pope's complaint invoked three provisions of Title I, pertaining to rights of members of unions: 29 U.S.C. §411(a)(1), §411(a)(2), and §411(a)(5); and the provisions of Title III, regarding trusteeships placed over local unions, 29 U.S.C. §462 and §464. These provisions are as follows:

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[1] Citations to the Appendix to the Petition for a Writ of Certiorari will hereinafter be cited as Cert. Pet. App. at ---.

29 U.S.C. §411(a)(1): Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitutions and by-laws.

29 U.S.C. §411(a)(2): Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal and contractual obligations.

29 U.S.C. §411(a)(5): No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. §462: Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or

other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

29 U.S.C. §464: (a) Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this subchapter (except section 461 of this title) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this subchapter (except section 461 of this title) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.

...

(c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board of before such other body as may be provided in accordance with its constitution and bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462 of this title. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 462

of this title. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

INTRODUCTION

This case raises several important issues on which the Courts of Appeals are in conflict. These issues have broad ramifications for the ability of labor unions to administer their own membership criteria, to discharge recalcitrant appointed employees, to oversee dysfunctional local unions through temporary trusteeships, and to empower trustees with the ability to discharge employees who are impeding the trustee's ability to govern the local union. The decision of the Sixth Circuit on these issues is largely without precedent, contradicts decisions of this Court, and conflicts with rulings of other Circuits.

The U.S. Court of Appeals for the Sixth Circuit issued the first appellate holding in U.S. labor law that a union's administrative issuance of a withdrawal card to an individual who no longer met any of the union's criteria for membership constituted "discipline" or "expulsion" from membership in violation of §101(a)(5) of the LMRDA, 29 U.S.C. §411(a)(5). This decision, which conflicts with two other circuits, would, if allowed to stand, severely impair the right of labor unions to establish and enforce reasonable membership rules and to limit their membership ranks to those with an active stake in the affairs of the union.

Building on its view on the meaning of withdrawal cards, the Sixth Circuit then made an equally unprecedented decision that threatens to eviscerate this Court's decision in *Finnegan v. Leu*, 456 U.S. 431 (1982). The lower court allowed Respondent Pope, who had been discharged from his appointed job as a local union business representative, to challenge his dismissal under the Title I membership rights provisions of the LMRDA on the theory that his termination led to his subsequent "expulsion" through the withdrawal card. This ruling has the effect of rendering a nullity for

an entire class of union employees *Finnegan's* holding that removal from appointive union employment is not actionable under Title I. For those employees like Pope who have never previously had any affiliation with an employer with whom the union bargains, but whose right to be a member exists solely by virtue of their appointive employment with the union, the Sixth Circuit's ruling amounts to turning Title I into a guarantee of job and membership security. This gives these members-by-employment more rights than the true rank and file members that the LMRDA was meant to protect.

The decision below is also the first appellate holding permitting issues of the validity of a trusteeship imposed on a local union, normally cognizable only under Title III of the LMRDA and only while the trusteeship is still in effect, to be litigated in an individual case under Title I. Ruling in direct conflict with other circuits that have held that once a trusteeship is over, challenges to the validity of imposing or maintaining it become moot, the Sixth Circuit concluded that because Pope had a damages claim stemming from his discharge by the trustee, his claims were not moot. With this ruling allowing Pope to challenge a terminated trusteeship under the membership rights provisions of Title I, the lower court also confused Title I and Title III. In permitting a trusteeship challenge to proceed under Title I, the court again conflicted with the rulings of other courts, which had held that the procedures set forth by Congress in Title III were the exclusive means of challenging the validity of a trusteeship. Another aspect of the Sixth Circuit's unprecedented entanglement of Title I and Title III was that it permitted a jury to pass judgment on the validity of a trusteeship, although all other courts had ruled that the validity of the imposition or maintenance of a trusteeship is a matter for the court to decide.

STATEMENT OF THE CASE

Although the facts presented to the jury were voluminous and hotly disputed, those centrally relevant to this Petition are more

straightforward. Seeking to avoid any conflict in the facts presented here, Petitioner draws primarily from those cited by the Court of Appeals,[2] or from facts not in dispute or admissions made by Respondent and his witnesses.

(a) Background Facts

Petitioner Office and Professional Employees International Union, AFL-CIO, CLC [hereinafter OPEIU], as an international labor organization is the sole recognized bargaining agent for employees of the Tennessee Valley Authority (TVA) in a unit of clerical and administrative workers. OPEIU Local 268, in Knoxville, Tennessee, is an affiliate of the OPEIU and the overwhelming majority of Local 268 members are employees of TVA. Local 268 does not engage in collective bargaining with TVA, is not a party to the collective bargaining agreement with TVA, and also is not a party to this lawsuit although it is involved in some of the events of this case.

Local 268 normally employs a business representative to assist in processing grievances for TVA employees and to engage in collective bargaining with the two non-TVA employers within Local 268's jurisdiction. In June 1988, the Local 268 Executive Board appointed Respondent Phillip Pope as business representative. Pope had no prior affiliation with the OPEIU or Local 268, and he had never worked for any employer with a bargaining relationship with the OPEIU or any of its locals. Pope's

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[2] The jury verdict was based on evidence that never should have been presented, such as evidence pertaining to whether the moot trusteeship was established and maintained for proper reasons, and the court's direction that Pope had his membership rights violated by an "expulsion" with the withdrawal card. The verdict was also based on an improper charge that framed the case as concerning only Pope's individual membership rights, rather than his job rights or whether there was any actual suppression of speech or dissent among members.

job description stated that the business representative "should be a dues-paying member" of Local 268. Upon being hired, Pope joined the union. Since Pope's sole basis for membership was his appointed job, Local 268 could not represent him for any collective bargaining or grievance purposes. JA 409.[3]

Pope soon became involved in internal union disputes with some members of the Local 268 Executive Board, which led to a claimed schism within the Local. These disputes erupted at a tumultous October 1989 Local membership meeting described by some witnesses as utter chaos. The meeting was never completed when most of those present walked out. 74 F.3d at 1497. Even though the Local constitution required officer nominations for an election scheduled for December to be made at this meeting, no nominations were ever made.

After this breakdown in Local functioning, several officers of the Local 268 Executive Board petitioned OPEIU President John Kelly to place a trusteeship over the Local. After looking into the situation and receiving additional information, on October 25, 1989 Kelly appointed international union representative Donald Wright as trustee of Local 268. Wright arrived in Knoxville on October 30, 1989 and put the trusteeship into effect. He immediately removed all the Local 268 officers from their positions, JA 993, and he became sole administrator of the affairs of Local 268. He retained Pope in his appointed job as business representative, pursuant to specific instructions from OPEIU President Kelly. JA 993. Wright thus became Pope's supervisor.

(b) The Discharge of Phillip Pope

On December 5, 1989, trustee Wright gave Pope a written reprimand for conduct that undermined the ability of the trusteeship to function, and cautioned him that further misconduct would

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[3] In this Petition, "JA" refers to the Joint Appendix in the U.S. Court of Appeals, which contains most of the relevant trial transcript excerpts.

jeopardize his job.[4] Wright subsequently discharged Pope on February 8, 1990. The discharge occurred because Wright learned that in January Pope and his supporters had used the internal TVA mail system to circulate a letter to Local 268 members urging them to write Kelly and threaten that if Pope was terminated they would withhold dues and give their dues money instead to a "legal defense fund to be established for the purpose of challenging your actions." D.Ex. 47, p.2., JA 606. Pope acknowledged that he helped prepare the document and that such a dues withholding would have prevented Local 268 from functioning. JA 601, 603.

Wright first investigated this before taking any action. He checked with Faye Orr, the OPEIU chief negotiator with TVA, who informed him that based on two prior mailings rejected by TVA and an internal TVA memorandum, this was not a proper use of TVA mail under the union contract. JA 1021. Orr also relied on a legal memorandum discussing this Court's ruling in *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988). Wright went further and also checked with TVA's chief of salaried labor relations, who likewise said that Pope's use of internal TVA mail was improper, JA 1021, and that TVA might remove the contractual privilege of allowing Local 268 to distribute official union notices through the internal mail system. JA 808.[5]

Wright then called a membership meeting of TVA employees to inform them that this distribution was wrong and might

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[4] This conduct consisted of Pope using his position as business representative to try to persuade the membership that the trusteeship was illegal and that the upcoming trusteeship hearing would be a "kangaroo court," thereby escalating the schism, as well as Pope trying to undermine the OPEIU bargaining representative with TVA. 74 F.3d at 1498-99.

[5] It is also significant that under federal law, TVA is not obligated to engage in collective bargaining with unions, but does so voluntarily. Thus, maintaining a sound relationship with TVA is particularly important if the OPEIU is to continue representing TVA employees.

jeopardize privileges with TVA. Wright asked his employee Pope to speak in support of the trustee's position at this membership meeting, but Pope refused. JA 595. Pope admitted that he refused because he did not believe Wright and said he had made up the story about TVA's opposition to suppress the rights of members. JA 595-96. Wright considered Pope's position on the misuse of internal TVA mail a "most serious insubordination," and he called Kelly to get permission to discharge Pope. JA 1026. Wright told Pope that his termination was due to "incompatibility with the Local." 74 F.3d at 1499; Cert. Pet. App. 9a.

Approximately one month after Pope's discharge, on March 7, 1990, Wright, acting pursuant to mandatory provisions of the OPEIU Constitution,[6] issued a withdrawal card to Pope because he no longer met any criteria for being a member. The effect of a withdrawal card is that the holder may not participate in the operation of any Local, but, upon resuming work within the jurisdiction of the Local the individual can surrender the card and resume active membership without any initiation or transfer fees. OPEIU Constitution Art. XXI, Sec. 1(c).

In January, 1991, after several succeeding events, including a membership vote not to merge Local 268 with OPEIU Local 119 in Chattanooga, OPEIU President Kelly recommended to the OPEIU Executive Board that the trusteeship over Local 268 be ended. An

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[6] The OPEIU Constitution, Art. XXI, Sec. 1(b) provides:

"Whenever any member is not in the employment of any employer who bargains with any Local Union or the International Union, the Local Union shall issue a withdrawal card to such member, subject to the provisions of this section. This subsection shall not apply to any member who holds office in, or is employed by, the International Union, or any of its Local Unions or Councils, any federation or council of labor organizations with whom the International Union or any of its Local Unions is affiliated, or any central body with whom any Local Union is affiliated..."

election for new Local 268 officers was held, which was won by a slate supportive of Pope, and right after the election the OPEIU ended the trusteeship on April 30, 1991. The new Local 268 Executive Board rehired Pope as business representative. 74 F.3d at 1499-1500; Cert. Pet. App. 10a-11a.

(c) Proceedings in the District Court

This action was filed in the district court on August 20, 1990, nine months after the beginning of the trusteeship and six months after Pope was fired. Initially, five other Local 268 members joined Pope as plaintiffs, and the case asserted four causes of action: (1) a claim under LMRDA Title III, 29 U.S.C. §464, that the trusteeship was not validly imposed or maintained; (2) a claim under LMRDA Title I that the imposition and maintenance of the trusteeship and the discharge of Pope from his appointed job and the issuance of a withdrawal card violated plaintiffs' rights under 29 U.S.C. § 411(a)(1) and (2); (3) a claim that Pope's job termination and consequent end of his membership constituted "expulsion" or "discipline" in violation of Pope's rights under §411(a)(5); and (4) a challenge under 29 U.S.C. §463 to the proposed but never consummated merger with Local 119 in Chattanooga.

The district court granted summary judgment to OPEIU on the claims of all plaintiffs except Pope, on the ground that they had suffered no injury to any membership rights. In later proceedings, after the trusteeship was ended, the court dismissed the cause of action concerning the trusteeship as moot, and it also dismissed the merger claim for the same reason. All that remained for trial were Pope's Title I damages claims. The OPEIU argued that since the trusteeship claim had been dismissed as moot, the only arguably remaining issue was Pope's discharge, and that all evidence concerning the imposition or maintenance of the trusteeship should be excluded. The trial court disagreed, reasoning that Pope could challenge the trusteeship as a violation of his Title I rights.

During the trial, the court directed a verdict for Pope on the third cause of action under §411(a)(5), ruling that the issuance of a withdrawal card was "expulsion" or "discipline." The jury returned a verdict for Pope on his other Title I claim, with $100,000 in compensatory damages and $100,000 in punitive damages, and $1 on the §411(a)(5) claim.

The OPEIU moved for judgment as a matter of law or in the alternative for a new trial. The trial court denied this motion (Cert. Pet. App. B, 39a - 73a), and the jury verdict became the final judgment of the district court. The OPEIU appealed to the Sixth Circuit pursuant to 28 U.S.C. § 1291.

(d) Decision of the Court of Appeals

In a 2-1 decision, the Sixth Circuit majority first rejected OPEIU's argument that under *Finnegan v. Leu*, Pope had no Title I claim because he was not a true rank and file member, but was merely a discharged appointed employee. The majority stated that Pope's situation did not fall neatly within *Finnegan* because in its view Pope was "expelled" from the union. Accordingly, said the majority, this case was different from *Finnegan* and from its prior holding in *Cehaich v. International Union, United Automobile Workers*, 710 F.2d 234 (6th Cir. 1983), where a discharged employee had still remained a union member after his termination. Under this distinction drawn by the majority, Pope had a Title I claim for his discharge "because he was disciplined in a manner which affected his right to fully enjoy the rights and privileges of union membership." 74 F.3d at 1503, Cert. Pet. App. 17a. In so holding, the majority improperly conflated two separate events – Pope's job termination, and the subsequent issuance of a withdrawal card because he no longer met any membership criteria – as the dissenting judge pointed out.

The majority's analysis of whether Pope had a claim to challenge his discharge was infected with its view on the legal effect of the issuance of a withdrawal card. Failing to analyze OPEIU's

contention that withdrawal card provisions are a routine administrative way most unions keep membership roles current, the majority simply stated: "There can be no doubt that the issuance of a withdrawal card is the equivalent of expulsion from the union." 74 F.3d at 1508, Cert. Pet. App. 28a. The majority further stated that the withdrawal card provision did not apply to Pope because it excepted any one who is employed by a local union. The majority ignored the fact that at the time he was issued a withdrawal card, four weeks after his discharge, Pope was no longer employed by the union. It also ignored the OPEIU's long-standing, consistent, and reasonable interpretation of its own constitution that the "exception" for union employees or officers applied only to *current* employees or officers. Thus, the majority failed to heed this Court's decision in *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233 (1971), which held that courts should not disturb a union's consistent interpretation of its constitution unless the interpretation is patently unreasonable. Having concluded that Pope had a membership rights claim to challenge his discharge, the Sixth Circuit proceeded to analyze Pope's case under the framework adopted for alleged interferences with membership rights completely unrelated to the union employment context. OPEIU had argued that if Pope had any claim under Title I, it was only under a very narrow exception to *Finnegan* developed by the Second Circuit. In *Franza v. Teamsters Local 671*, 869 F.2d 41 (2d Cir. 1989), the court held that a discharged appointed union employee could state a Title I cause of action if the employee could prove by clear and convincing evidence that the discharge was part of a purposeful and deliberate attempt to suppress dissent within the union, with evidence of suppression of other members' rights apart from the discharge itself.

The Sixth Circuit ignored this line of cases, and proceeded to treat Pope's claim as if it were a pure individual membership rights case. It held that all Pope had to show to recover on his Title I claim was that he exercised free speech rights; that defendant took

action against him because of that exercise; and that he was damaged as a result. 74 F.3d at 1506; Cert. Pet App. 25a. With this framework, the majority completed its total departure from *Finnegan*, and removed this case completely from the context that Pope was discharged from an appointed job.

On the trusteeship issues, the Court concluded that "[t]he question of the propriety of the trusteeship is not moot because it has a direct bearing on whether Pope's Title I rights were violated." 74 F.3d at 1504; Cert. Pet. App. 21a. In so holding, the court directly contradicted decisions of the Seventh and D.C. Circuits, and became the first appellate court to rule that Title III trusteeship issues could be litigated under Title I. The court also rejected OPEIU's argument that a challenge to the validity of a trusteeship is for the court, and not a jury to decide.

Finally, the court sustained the jury's award of damages for emotional distress, and rejected the OPEIU's argument that any such damages could only be based on reactions to the discharge. Instead, the court relied on evidence that prior to his discharge, Pope was upset by the existence of the trusteeship. The combined effect of these trusteeship rulings – that after a trusteeship is over a jury can second-guess its existence and award substantial emotional distress damages to a union employee who was upset by the existence of the trusteeship – is potentially devastating to any parent union who must place a local in trusteeship.

(e) Dissenting Opinion of Judge Matia

District Judge Matia, sitting by designation, dissented in two crucial respects. He found that this case should have been treated as a straightforward *Finnegan* case, and that Pope had no standing to bring a claim under the LMRDA. He pointed out that Pope's discharge and the subsequent issuance of the withdrawal card were two separate events, and that Pope had no cause of action to challenge his discharge. 74 F. 3d at 1510; Cert. Pet. App. 34a - 35a.

He also found that the issuance of a withdrawal card to Pope once he lost his eligibility for membership was not an expulsion or discipline in violation of §411(a)(5), and the OPEIU's interpretation of its Constitution provision that mandated giving Pope the withdrawal card was reasonable and should be followed. He relied on a prior Sixth Circuit case holding that it was reasonable for a union to adopt membership rules that guaranteed that internal affairs would be governed by those with a current stake in the industry covered by the union. 74 F. 3d at 1511; Cert. Pet. App. 36a-37a.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Ruling That a Withdrawal Card Was an "Expulsion" From Membership Conflicts With Other Circuits, and Seriously Interferes With the Ability of All Unions to Administer Their Own Reasonable Membership Criteria.

The Sixth Circuit's conclusion that "the issuance of a withdrawal card is the equivalent of expulsion from the union," and thus violates 29 U.S.C. §411(a)(5) would, if allowed to stand, wreak havoc upon all 78 national and international labor unions affiliated with the AFL-CIO, upon literally thousands of local unions as well, and upon every other union covered by the LMRDA.

It is also in direct conflict with the recent ruling of the Second Circuit in *Yerdon v. Henry*, 1996 U.S. App. LEXIS 19872, 152 LRRM (BNA) 3029 (2d Cir. Aug. 6. 1996), *aff'g Yerdon v. Teamsters Local 1149*, 886 F. Supp. 226 (N.D.N.Y. 1995). The facts of *Yerdon* are in key respects quite similar to the present case. Yerdon was employed as a secretary to the local union, and like Pope, her right to be a member hinged on the continuation of her employment. When she was discharged from her job, she was subsequently issued a withdrawal card pursuant to the union by-

laws. As a removed member, she could no longer vote nor run for union office. The court ruled that she had no claim under Title I of the LMRDA, since under *Finnegan v. Leu* she could not challenge her discharge from her appointive job, and the withdrawal card provision was an entirely reasonable union rule that could therefore not constitute a violation of the LMRDA. 886 F. Supp. at 233. The Second Circuit affirmed this reasoning in all respects, and emphasized that her claims were completely precluded under *Finnegan*. 1996 U.S. App. LEXIS 19872 at *20.

The decision below also conflicts with the U.S. Court of Appeals for the Third Circuit in *Reich v. Local 30, International Brotherhood of Teamsters*, 6 F.3d 978 (3d Cir. 1993), which held in a Title IV election case that the rule mandating issuance of a withdrawal card after the plaintiff was unemployed in the trade covered by the union for six months was a reasonable rule under the union constitution, and thus could not form the basis for a cause of action under the LMRDA. *See also U.S. Department of Labor v. Aluminum Workers, Local 200*, 941 F.2d 1172 (11th Cir. 1991), an election case holding that a union's application of reasonable qualifications for membership does not constitute discipline under §411(a)(5).

Unions are undoubtedly entitled to adopt membership criteria that limit membership to those most directly concerned with the affairs of the union – people currently employed by an employer with whom the union collectively bargains, or officers and employees of the union. The LMRDA itself recognizes that union members' rights are at all times subject to reasonable rules and regulations adopted in unions' constitutions and by-laws. 29 U.S.C. §411(a)(1). As a necessary corollary to the right to establish reasonable membership criteria unions must have some administrative method for removing members from their rolls when they are no longer eligible for membership because of shifting employment situations. Petitioner OPEIU, like many unions, has provided for this necessity in its constitution by use of the

withdrawal card provision. Similarly, the unions in *Reich v. Local 30*, supra, and *Yerdon*, supra, also provided for the automatic issuance of withdrawal cards after a certain period of no longer being employed in the trade or by the union.

The OPEIU constitution, Art. XXI, Sec. 1 (see note 6, *supra* for full text), provides that whenever a member is not in the employment of any employer who bargains with the OPEIU or one of its Locals, or is not a union officer or employee, he or she must be issued a withdrawal card. After Pope was discharged, he no longer met these eligibility criteria, so it was mandatory under the constitution that he be given a withdrawal card. Absent such withdrawal card provisions, individuals like Pope, who no longer have any affiliation with the union or an employer with whom the union bargains, could retain their membership for the remainder of their lives, so long as they paid their dues, even if they had no further connection with the labor organization. Despite this lack of current connection, under the Sixth Circuit's ruling these "members" could, under 29 U.S.C. §411(a)(1), nominate candidates for union office, participate in membership meetings, and run for union office if they so desired. Yet, as other courts have pointed out, individuals who are no longer employed within the jurisdiction of the union may have serious conflicts of interest with union members. *Reich v. Local 30*, 6 F.3d at 987.

The operative effect of a withdrawal card shows how distinct it is from "expulsion." A withdrawal card is the equivalent of being placed on "inactive" status, and actually serves as a benefit to everyone who receives a card. Under the OPEIU constitution and those of most unions, once a person holding a card regains covered employment he or she can resume active dues-paying membership automatically without paying any initiation fee. OPEIU Constitution, Art. XXI, Sec. 1(b). For example, if Pope had become employed by TVA or one of the two employers with whom Local 268 bargained after receiving his withdrawal card, he could have deposited the card with Local 268 and immediately been readmitted

without any fees. Thus, issuance of a card is neither an act of discipline nor an expulsion.[7]

By holding that the issuance of a withdrawal card violates the LMRDA, the court below destroyed an important right of union self-governance to determine, administer, and control rules of membership. This right is fundamental to the existence of every union in the nation. Congress specified repeatedly, when enacting the LMRDA, that it desired a minimal interference with the internal affairs of unions. The withdrawal card question presented here substantially affects membership rights under Title I of the Act, 29 U.S.C. §§ 411(a)(1), (2), (5), and it also has a powerful impact on Title IV, 29 U.S.C. §481 et seq., concerning who can vote and run for union office. *See, e.g., Reich v. Local 30*, supra. The interference with union governance is dramatic, because in order to avoid LMRDA liability a union would, under the Sixth Circuit approach, have to give notice and hold a hearing under 29 U.S.C. §411(a)(5) before it could issue a card. No union currently does this; rather, withdrawal card issuance is an administrative, clerical act. Hearings would expend resources and time that could better be used to serve the needs and interests of individuals who are still employed within the jurisdiction of the union.

The conflict with the other circuits that deem withdrawal card provisions as reasonable rules that do not violate the LMRDA poses an intractable dilemma for labor unions. Virtually all national and international labor organizations have locals in many different jurisdictions, as does the OPEIU, and their ability to apply their constitutional withdrawal card provisions will now vary from local to local, depending on what circuit it is in.

Thus, because the decision below has such a deep and pervasive effect on the self-governance and administration of all unions, where the right to determine membership is crucial to their

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[7] Usually, when members are expelled for misconduct, they lose their right to reapply and be readmitted to membership.

survival, this Court should grant the writ to review it and resolve the conflicting circuit law.

II. The Lower Court's Ruling that Pope Had a Cause of Action to Challenge His Discharge Contradicts *Finnegan v. Leu*, Wrongfully Converts this Case Into One of Individual Membership Rights, and Conflicts with the Rulings of Other Circuits.

This should have been a straightforward case under *Finnegan v. Leu*, with Pope's Title I claim challenging his discharge dismissed because *Finnegan* squarely holds that employees such as Pope have no cause of action under Title I: "It is readily apparent, both from the language...and...the legislative history of Title I, that it was rank-and-file union members – not union officers or employees as such – whom Congress sought to protect. ... We discern nothing in [Title I] to support [the] claim that Congress intended to establish a system of job security or tenure for appointed union employees." 456 U.S. at 437-38.

Despite the clear holding of *Finnegan*, the court below sidestepped it because of its view that the issuance of the withdrawal card to Pope was "expulsion" from membership. Since the lower court thought that Pope was shorn of Title I membership rights when he was given a withdrawal card, it ignored the thrust of *Finnegan* and converted the case into solely a matter of protecting "membership" rights rather than a case of employee rights. According to the court below, the fact that Pope no longer remained a member after he was fired from his appointed job was sufficient to distinguish his case from *Finnegan*, and from its own prior holding in *Cehaich v. International Union, UAW*, 710 F.2d 234 (6th Cir. 1983). Cehaich was fired from his appointed position, but, the court below emphasized, "remained a member of the union." 74 F.3d at 1503, Cert. Pet. App. 16a. "Moreover, unlike Cehaich, Pope was expelled from union membership immediately after his termination from his position as business representative... Pope is

entitled to protection under the LMRDA because he was disciplined in a manner which affected his right to fully enjoy the rights and privilege of membership." *Id.*; Cert. Pet. App. 17a.

The import of the Sixth Circuit holding is that unions cannot discharge their appointed employees without incurring LMRDA liability whenever those employees are entitled to be members only by virtue of their employment. This holding is in direct conflict with the Second Circuit's ruling in *Yerdon*, supra, that an employee in the identical situation was barred by *Finnegan* from suing over her discharge. Moreover, the Sixth Circuit interpretation has opened a potentially huge loophole that threatens to eviscerate *Finnegan* and turns the LMRDA into a guarantee of job security for a class of member-employees who have no rank and file connection to the union but rather are appointed from outside the union and thus have no basis for membership other than their job. This accords greater rights to this type of member than to true rank and file members who work for employers with whom the union bargains.

The ramifications of the Sixth Circuit decision and the conflict thereby created with other circuits are serious for labor unions. Many unions hire employees from outside their rank and file membership, and unions must retain this right to hire the people they deem most suited by experience. Unions also have good reasons for allowing these employees to become members while they are employed, in order to enhance their sense of connection to the people they are representing or trying to organize. The decision below puts unions in the position of having to refuse to permit these employees to become members in order to avoid the specter of LMRDA liability if they wish to retain the right to discharge. This constitutes an unwarranted incursion on union's rights to self-governance, to establish reasonable membership criteria, and to make employment decisions. The conflicting circuit law also presents an untenable dilemma for unions, since many operate nationwide. For example, a union that employs two organizers – one based in Tennessee and one based in New York– who can

remain members only so long as they are so employed, but then decides that it would be in the best interest to let both of these organizers go, may nonetheless be loathe to take the necessary action regarding the Tennessee employee, because doing so will lead to LMRDA liability.

Thus, the question of whether *Finnegan* still applies to appointed employees whose sole basis for membership is their job, as other circuits have ruled, or whether the exception to *Finnegan* created by the Sixth Circuit is valid, is one of utmost importance to the functioning of all labor unions. Not only is the viability of an important labor law decision by this Court at stake, but so is the ability of unions to discharge a major class of their own employees.

Presumably, if Pope had never received a withdrawal card after his discharge, the court below would have properly applied *Finnegan*. Thus, a correction of the lower court's wrongful decision on the withdrawal card issue would allow the thrust of *Finnegan* to be followed and end this case with a judgment for Petitioner. The only possible basis Pope would have for overcoming *Finnegan* would be under a very limited exception recognized by the Second Circuit, which has held that a discharged employee "states a cognizable Title I claim when he demonstrates upon clear and convincing evidence that dismissal was part of a scheme to suppress dissent." *Franza v. International Brotherhood of Teamsters, Local 671*, 869 F.2d 41, 45 (2d Cir. 1989); *Cotter v. Owens*, 753 F.2d 223 (2d Cir. 1985). The Second Circuit itself has stated that it is "ambiguous" whether *Finnegan* allows for such an exception, *Cotter*, 753 F.2d at 229, and other courts have expressed reservations about such an exception, noting that "because any discharge ... of an appointed staff member carries with it, by its very nature, some suppression of dissent, this exception risks eviscerating *Finnegan* altogether. Consequently, it is a very narrow exception, applied only in unusual circumstances." *Nixon v. United Food and Commercial Workers Union*, 751 F. Supp. 1491, 1494

(D. Colo. 1990).[8] The Second Circuit has cautioned that this exception should be rarely invoked, and must require clear and convincing proof of a long history or articulated policy of dissident suppression, some actual interference with other members' rights, something much more than an isolated act of retaliatory discharge of the appointed employee, and no legitimate basis for the discharge. *See, e.g., Franza*, 869 F.2d at 45, 48-49; *Cotter*, 753 F.2d at 229; *Johnson v. Kay*, 860 F.2d 529, 536-37 (2d Cir. 1988).

Under any possible interpretation of this potential exception to *Finnegan*, Pope could not produce clear and convincing evidence of these narrowly interpreted factors. As the OPEIU showed, through admissions of Pope and his witnesses, there was no suppression of speech and dissent whatsoever. For example, Pope admitted repeatedly that he and his cohorts had full freedom of speech throughout, and exercised it most effectively. JA 301, 328, 522, 528, 621. Three of his key supporters, Davenport, at JA 733-34, Carter at JA 702, and Thompson at JA 675, unanimously and unequivocally agreed there was no restriction of any sort on their rights of speech and assembly.[9]

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[8] In *Sheet Metal Workers Int'l Ass'n v. Lynn*, 488 U.S. 347, 356 n. 6 (1989), this Court indicated that it has not definitively resolved the existence of this exception. The *Lynn* court noted that in *Finnegan* it said there *might* be a Title I claim if an official was dismissed as part of a purposeful and deliberate attempt to suppress dissent, but that "we merely stated that we did not have such a case before us, and that we expressed no view as to its proper resolution. 456 U.S. at 441."

[9] Contrast this evidence with that in *Cotter*, 753 F.2d at 229, where the union had for a period of 15 years prevented a dissident group from presenting its proposed by-law amendments to the membership, despite several injunctions ordering the union to let them to do so, and had removed numerous dissident members from various positions; and with that in *Johnson*, 860 F.2d at 537, describing extensive incidents of physical intimidation to prevent dissident members from addressing meetings, as well as barring dissidents from publishing their views in the union newsletter.

The Sixth Circuit ignored Petitioner's arguments about the narrow confines of and total lack of evidence for the "deliberate plan to suppress dissent" exception because the court treated Pope's claim entirely within the framework of an alleged infringement of membership rights outside the union employment context. In analyzing the evidence the Sixth Circuit said Pope's claim only had to satisfy a Title I test drawn from *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461 (6th Cir. 1992), which was a pure membership case not involving a discharged employee, and thus far removed from anything remotely relevant in a *Finnegan* situation. It also evaluated the evidence under a mere "sufficiency" test, not the clear and convincing evidence standard demanded by other circuits.[10] 74 F.3d at 1507, Cert. Pet. App. 25a- 26a.

This emphasis on Pope's individual membership rights, and the complete negation of the requirement for clear and convincing evidence of a plan to suppress speech and dissent demonstrated by acts of suppression other than the discharge of an employee raises important issues about the continued viability of *Finnegan*. As this Court noted in *Sheet Metal Workers Int'l Ass'n v. Lynn*, 488 U.S. 347, 349 (1989), questions regarding the scope of unions' rights to remove employees and officers are of sufficient importance to the internal governance of unions to warrant review. If the way the

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[10] Some of the evidence it cited was not evidence of anything wrongful under *Finnegan*, such as the fact that the trustee acted promptly to hire a new business representative after he terminated Pope, and expressed the hope that "Pope would move on." Obviously, if the governor of a union has the right to fire appointed employees without violating any Title I rights, he also has the right to replace them and wish them out of the picture without this forming the basis for Title I liability. The court also used evidence regarding the maintenance of the trusteeship, an error under Title I for reasons discussed in the next section of this Petition. The court also relied on the fact that Pope was not allowed to run for office because he had been issued a withdrawal card -- no evidence of any Title I violation for reasons previously discussed. The court did not even discuss, and thus apparently deemed irrelevant, the reason of insubordination that supported Pope's discharge.

Sixth Circuit ignored *Finnegan* and converted discharged employee Pope's case into one solely about membership rights is allowed to stand, then unions as employers will have lost a crucial self-governance right.

III. In Submitting Moot Title III Trusteeship Validity Issues to a Jury to be Tried under Title I, the Sixth Circuit Ruled in Conflict With Other Circuits and Upset the Procedures Designated by Congress for Reviewing the Validity of Trusteeships.

Petitioner's position throughout this litigation, resting on ample law from other Circuits, was that once OPEIU lifted the trusteeship over Local 268 and the trial court declared moot the Title III claim challenging the validity of imposing and maintaining the trusteeship, all issues regarding whether the trusteeship was imposed or maintained for reasons permissible under Title III should have been excluded from trial. OPEIU further asserted that Title III is the exclusive cause of action for challenging trusteeships, and that the validity of the trusteeship should therefore not be litigated under Title I. The individual membership rights of Title I, and the rights of unions to be free of improper trusteeships are separate matters. OPEIU also argued that discharged employee Pope had no right to bring a Title I claim seeking individual damages for the existence of the trusteeship, because the only actions that individually affected him -- his discharge from employment, and his receipt of a withdrawal card – were not even incursions on Title I rights, much less cognizable under Title III.

The Sixth Circuit rejected all of these arguments and thereby placed itself in direct conflict with other Circuits. By allowing Title III trusteeship issues to be submitted to a jury in a Title I case, the court below also ushered into labor law confusion regarding the proper procedure for challenging trusteeships and the interrelationship of Title I and Title III.

Although recognizing that the Seventh and District of Columbia Circuits have held that once a trusteeship has been lifted, all questions regarding its validity are moot, the court below decided not to follow these rulings and held that Pope could litigate the validity of the expired trusteeship in his Title I case, "because it has a direct bearing on whether Pope's Title I rights were violated." 74 F.3d at 1504; Cert. Pet. App. 21a.

The Seventh Circuit case, *Airline Stewards and Stewardesses v. Transport Workers Union*, 334 F.2d 805 (7th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965), like Pope's case, involved a Title III claim to vacate a trusteeship and to reinstate the local union officer and union employees who had been removed by the trustee. The district court had preliminarily enjoined the trusteeship, and two months later the international ended the trusteeship for other reasons. On appeal, the removed officer argued that even though the trusteeship was over, the question of its legality was not moot because issues of its illegality were connected to his removal from office. Rejecting this argument, the Seventh Circuit ruled that all issues relating to the trusteeship were moot. Significantly, the court also rejected the officer's efforts to bring the trusteeship's legality into his claim under Title I challenging his removal. First, presaging *Finnegan*, the court ruled that Title I did not protect officers as such. Then, in language particularly applicable here, it said:

> Although the same circumstances may lead to both the imposition by the international of a trusteeship and the removal of an officer of the local, the consequences give rise to separate and distinct causes of action. The facts supporting a suit for restraint of a trusteeship and one for reinstatement of a union official are not substantially the same because they do not constitute a single wrong. 334 F.2d at 808.

The D.C. Circuit, in *Laborers' International Union v. National Post Office Mail Handlers*, 880 F.2d 1388 (D.C. Cir.

1989), ruling that an appeal of a motion to enforce a trusteeship was moot, cited with approval the Second Circuit's conclusion that "the statutory scheme ... clearly evidences an expectation that disputes over trusteeships would be litigated with the trusteeship in effect." *Id.* at 1394, quoting *National Ass'n of Letter Carriers v. Sombrotto*, 449 F.2d 915, 921 (2d Cir. 1971). The D.C. Circuit also reviewed the legislative history of Title III, and pointed out that all the problems cited by Congress "pertain only to *existing* trusteeships." 880 F.2d at 1395 (emphasis in original).

The language and structure of the statute further demonstrates that the validity of a trusteeship may not be tested after its expiration. 29 U.S.C. §464(c) provides that a trusteeship shall be presumed valid for eighteen months "and shall not be subject to attack *during such period* except upon clear and convincing proof that the trusteeship was not established or *maintained* in good faith for a purpose allowable under section 462." Once the eighteen month period has expired, the trusteeship shall be presumed invalid unless the union demonstrates its continued necessity, "*and its discontinuance shall be decreed.*" *Id.* (Emphasis added) This statutory remedy – ordering an improper trusteeship discontinued – shows that Congress contemplated that the validity of a trusteeship may be tested only while it is in existence.

In the present case, to support its decision to depart from other Circuits and find that Pope's challenge to the validity of the trusteeship was not moot, the Sixth Circuit took out of context this Court's decision in *Sheet Metal Workers Int'l Ass'n v. Lynn*, 488 U.S. 347 (1989). In *Lynn*, while holding that *elected* union officers had a Title I right not to be removed by a trustee in retaliation for exercising free speech rights, this Court stated that Title I rights do not "fall by the wayside whenever a trusteeship is imposed." *Id.* at 356. The court below misconstrued this statement as implying that the validity of a trusteeship could be tried under Title I, rather than Title III. What this Court surely meant in *Lynn*, however, was that Title I rights exist separate from questions concerning the reasons

for existence of a trusteeship, and that a trustee, like any union official, has to treat members in accordance with Title I.

Thus, as occurred in *Lynn*, a trustee whose appointment was entirely valid under Title III could act against individual union members to violate their Title I rights, and the union would be held accountable. On the other hand, a trustee whose appointment was in clear violation of Title III could act with fidelity to Title I rights, and the invalidity of the trusteeship would not suddenly create a Title I violation. In each situation, the proper issue is whether specific actions of the trustee violate Title I rights, and not whether the trusteeship itself was imposed or maintained for improper reasons. Whether the trusteeship is valid or invalid would have no bearing on an actual violation of Title I. If, as Respondent contends in this case, the trusteeship was maintained to suppress Pope's Title I rights, his Title I case should properly concern the facts of the occurrence of such an alleged specific action in suppression of particular Title I rights, and not the issue of whether the trusteeship in general was established or maintained for reasons that would make it invalid under Title III.

By collapsing Title III trusteeship validity issues with Title I individual rights issues and thereby overcoming the mootness rulings of other Circuits, the court below created confusion about the proper relationship between Title I and Title III. Until the decision below, other courts, including the Sixth Circuit itself, had squarely held that Title III is the exclusive cause of action for testing the validity of the reasons for imposing or maintaining a trusteeship, and that the validity of a trusteeship was not a cognizable Title I issue. In *Farrell v. International Brotherhood of Teamsters*, 888 F.2d 459 (6th Cir. 1989), the court held that trusteeship validity issues may not be litigated through Title I, because to do so "would reduce to surplusage those provisions of Title III which provide a specific remedy for improper establishment of trusteeships." *Id.* at 461. The plaintiffs in *Farrell* had claimed that a trusteeship was imposed as a stratagem to keep

them from electing local officials of their own choosing, thus violating their Title I rights. The court noted that whether Title I rights were actually violated and whether the trusteeship was imposed for improper reasons under Title III were two separate issues, and that the latter issue could not be collapsed into the Title I claim.

The court below sought to buttress its position that the validity of the trusteeship could be litigated under Title I even though it had ended by reasoning that "[i]f evidence regarding imposition or maintenance of a trusteeship after it has been lifted were inadmissible, national and international unions could impose trusteeships with impunity, including as a means to suppress Title I rights, and remain immune from legal scrutiny so long as they lifted the trusteeship before the plaintiff has his day in court." 74 F.3d at 1504; Cert. Pet. App. 20a.

This reasoning is erroneous, because any union member can file a complaint with the Secretary of Labor or file suit under Title III as soon as a trusteeship is instituted and seek a TRO or preliminary injunction to have it set aside as not properly established. This is the procedure contemplated by Congress, and followed in numerous instances. The usual remedy Congress contemplated for improper trusteeships is an injunction removing them. 29 U.S.C. §464(c). Then, if any actual suppression of Title I rights had occurred during the pendency of the trusteeship, the affected member would still have a Title I claim to prove such a violation. But that claim would not be about whether the trusteeship had improperly existed, it would be about whether particular acts suppressing membership rights protected by Title I – not job rights– had occurred. Once a trusteeship is over, whether or not its existence was invalid and it should be terminated is irrelevant, and thus moot.

In blurring the distinctions between Title I and Title III, the case below also conflicts with *Gesink v. International Ass'n of Machinists and Aerospace Workers*, 831 F.2d 214 (10th Cir. 1987),

which held that an appointed union business representative discharged by a trustee has no cause of action for individual job loss damages under Title III. Plaintiff, much like Pope, had argued that the trusteeship was established for improper reasons, and that the trustee's action discharging him was therefore invalid. The court held that plaintiff could not get around *Finnegan* in this manner, and that "nothing in the legislative history of Title III indicates an intent to protect the positions of union officers and employees." *Id.* at 216. Title III is for challenging the validity of the trusteeship on behalf of the subordinate union; Title I is for protecting individual member rights, whether or not a valid trusteeship is in effect, and neither Title protects the employment of appointed business agents.

IV. Even If the Law Allowed the Validity of a Moot Trusteeship To Be Decided After It Is Over, No Court Has Previously Allowed A Jury To Decide This Issue

One serious effect of the lower court's decision to let Pope try the Title III issue of the trusteeship's validity as part of his individual Title I case, was that it permitted a *jury* to decide whether the trusteeship had been imposed or maintained for improper reasons. The Sixth Circuit reasoned that a jury could decide this because Pope's claim was an action at law to recover damages for the suppression of Title I rights *as a result of the imposition of a trusteeship*. 74 F.3d at 1505; Cert. Pet. App. 21a (emphasis added). Apparently the court meant that the mere existence of a trusteeship is a suppression of Title I rights if the trusteeship exists for reasons improper under Title III. Again, the court confused two separate issues – the validity of the trusteeship under Title III, and whether the trustee took certain actions that violated Title I rights.

Until this decision below, all other courts to consider the proper forum for Title III issues have ruled that assessing the propriety of the reasons for imposing and maintaining a trusteeship

is fundamentally a question for the *court*.[11] *See, e.g., Jolly v. Gorman*, 428 F.2d 960 (5th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). The legislative history of Title III also states that Title III matters regarding the validity of trusteeships are "proceedings in equity," and thus tried to a court. H.R. Rep. No. 741, *reprinted in* 1959 U.S. Code Cong. & Admin. News 2427.

The implications of allowing a jury to decide Title III issues in a Title I damages case after a trusteeship is over risk serious incursions on union self-governance. Many trusteeship issues – the reasons for imposing a trusteeship, the procedure for applying one, the timing and format of the hearing – are heavily intertwined with unions' constitutions. Thus, a jury might well become embroiled in interpreting, and possibly disagreeing with, a union's constitution. But, as this Court has noted, unions' reasonable interpretations of these crucial self-governing documents are entitled to a great deal of judicial deference. *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233 (1971). Moreover, allowing juries to assess in hindsight the propriety of a terminated trusteeship in the heated emotions of a Title I case could lead to second guessing the judgment of union officials regarding the need for a trusteeship, with possibly devastating damages consequences for the union if the jury disagreed with their assessment of the situation. This would be a far greater intrusion into the internal affairs of union than the limited amount contemplated by Congress under Title III, where trusteeships are entitled to a presumption of validity for eighteen months. 29 U.S.C. §464(c).

The conflicts created by the Sixth Circuit's rulings on all these trusteeship issues present an intolerable situation for nationwide

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[11] Under prevailing law, no court in the Sixth Circuit would have found this trusteeship improper, since the reason it was imposed -- to quell factionalism that was preventing Local 268 from engaging in acts necessary to the democratic process -- has been held to be a proper reason under Title III. *Teamsters Local 406 v. Crane*, 848 F.2d 709 (6th Cir. 1990).

labor organizations. A parent union may often have to place more than one local in different jurisdictions under trusteeship at the same time. Unless the lower court's ruling is reviewed, an international union may be subjected to second guessing and damages by a jury long after it has ended one trusteeship, while with regard to another local its actions will be judged in accordance with Title III by a court while the trusteeship is still in effect. The uncertainty may deter parent labor unions from resorting to the important supervisory device of a trusteeship even though they have compellingly valid reasons under Title III for doing so.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 13, 1996

APPENDIX

APPENDIX A

No. 94-5399

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

P.J. THOMPSON, et al.,
Plaintiffs,

PHILLIP R. POPE,
Plaintiff-Appellee,

v.

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Defendant-Appellant.

} ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed February 8, 1996

Before: JONES and RYAN, Circuit Judges; MATIA, District Judge.*

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*The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

RYAN, J., delivered the opinion of the court, in which JONES, J., joined. MATIA, D.J. (pp. 34-38), delivered a separate opinion concurring in part and dissenting in part.

RYAN, Circuit Judge. The defendant, Office and Professional Employees International Union (OPEIU), appeals the jury verdict for the plaintiff in this action under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(1), (2) and (5), arising from the termination of the plaintiff's position as a business representative for the OPEIU following the imposition and lifting of a trusteeship. We are asked to determine: (1) whether Pope has standing to bring a claim under the LMRDA; (2) whether the district court erred in permitting a jury to decide issues surrounding the imposition and maintenance of the trusteeship; (3) whether the district court erred in admitting letters from the United States Department of Labor; (4) whether there was sufficient evidence for the jury to conclude that the trusteeship was maintained as a purposeful and deliberate attempt to suppress dissent within the local union; (5) whether the district court erred in directing a verdict for Pope on the issue of whether Pope's union membership rights were violated when he was issued a withdrawal card after he was fired; (6) whether there was sufficient evidence to support the jury's award of emotional distress damages; (7) whether there was sufficient evidence to support the jury's award of punitive damages; and (8) whether the district court erred in refusing to grant OPEIU's motion for a mistrial on the grounds that Pope spoke with the jury foreman. We conclude that the district court did not err and that there is sufficient evidence to support the jury verdict.

A detailed recitation of the facts is necessary for an adequate understanding of our decision.

I.

After twenty eight years of working in the labor union movement in positions that required significant travel obligations, Phillip Pope joined Local 268 of the OPEIU in Knoxville, Tennessee, as a business representative. Pope

was appointed, not elected, to the position. The position allowed Pope to spend more time at home with his new family. The OPEIU represents employees at companies such as the Tennessee Valley Authority (TVA) and Baptist Hospital.[1] His position as business representative is described in the job description as "that of [an] agent for the union in its various dealings with management and as advisor to the Local Union officers various matters concerning contract negotiations, training of job stewards, grievance processing, and organizational activities." The job description also provides that the business representative "should be" a dues-paying member of OPEIU Local 268." Pope's understanding was that this provision did not require him to join the local union. During his interview for the position, Tim Witt, the President of the Executive Board of Local 268 at the time, informed Pope that he should join the union but that he would not force him to become a member.

Soon after Pope began working for Local 268, he concluded that the Executive Board was, in several respects, acting in violation of the local's bylaws, the OPEIU constitution, and federal law. Pope learned, for example,

- that one person on the board held two positions in violation of the local and international unions' constitutions;
- that the board improperly increased membership dues in violation of Title I of the LMRDA, 29 U.S.C. § 411(a)(3);
- that the board did not sign checks with the proper number of signatures in violation of the local and international unions' constitutions;

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[1] Pope claims that the OPEIU also represents employees at Martin Marietta. The OPEIU denies any involvement with Martin Marietta.

- that the board was improperly scheduling elections and meetings for nominations;

- that the board improperly handpicked delegates to be sent to the OPEIU convention and was improperly using union funds for political purposes; and

- that telephone calls from members to the local office were always answered by an answering machine and that grievances were lost and not processed.

Pope brought these illegalities to the attention of the board and the members of the OPEIU leadership. As to the problems regarding the elections, Pat Allen, the Secretary-Treasurer of the Executive Board, responded that the board had been running the elections the same way for twenty years and that they did not need Pope telling them how to run their elections. When Pope informed Faye Orr of the OPEIU in June of 1989, Orr told Pope that the international union did not get involved in politics and suggested that he discuss the problems with the local board. Nevertheless, Orr, in June 1989, wrote an internal OPEIU memorandum stating:

> To keep you further informed on the internal politics.
> . . .
>
> To make matters worse, gossip is out that Phillip [Pope] is trying to have Pat [Allen] ousted from the Executive Board and as Shop President. To keep the International cleared from all the suspicion, I am dealing almost exclusively in matters such as this with Pat or Tim Witt.

During this time, morale within Local 268 was at an all-time low mainly due to massive layoffs by the TVA. Pope, when asked, was more than willing to share his discoveries of the board's illegalities with members of the union. Support for Pope grew within the union and soon a slate of candidates was formed to run against the incumbent board in the December 1989 elections. Pope was the challengers' choice to run for president of the

board. Pope testified that the slate stood for "making our union responsive to the will of the members which meant probably kicking out most, if not all, of the old officers, bringing our constitution and bylaws up to date like should have been done, running our union the way it should be run, [and] being more responsive to the members' problems [and] needs."

According to Pope, in April or May of 1989, he had a conversation with Orr in which Orr stated that "she understood that Jim Cash and [he] were planning on running for local union office or president of our local union." Pope responded that at that time he was "still testing the waters." Orr allegedly responded, "let me tell you. There is no way in hell OPEIU will tolerate that . . . ." Orr also allegedly had a similar conversation with Jim Cash, the business agent of the OPEIU Local 18 in Alabama. According to Cash, Orr telephoned him and said, "what's this I hear about you and Phillip [Pope] running for President of the locals." Cash responded, "well, what's wrong with that, Faye, we're both members." Orr then answered, "you know that the OPEIU is not going to allow that."

In August 1989, two months before nominations for the December elections were to take place, the incumbent board proposed a change to the local's constitution. The proposed change would read: "All full-time paid staff of the local and all representatives of the international union shall be associate members of this local with the privileges of participating in this local's meetings but not voting." Because Pope was a full-time paid staff member, he interpreted this provision as designed to prevent him from running for office.

In an October 16, 1989 meeting, Allen moved to fire Pope. Allen withdrew the motion for lack of support and resigned from office. Maxine Keeble, another member of the board, moved to force Pope to stop "politicking" or to resign. A member of the reform slate, Jo Davenport, was voted in to replace Allen. The membership then voted and

passed a proposal that Pope run for president. The meeting ended abruptly, without adjournment, when members of the local simply walked out.

This October meeting was described by members of the board as chaotic and out of control. Cletus Walles described the meeting as follows:

> [I]t wasn't a meeting, it was a joke, it was a boisterous, unruly people, they were talking out of turn, it really wasn't a meeting. You couldn't call it a meeting because we weren't going by any rules and regulations of a meeting. Various things were said, a lot of emotions were being shown at that meeting; all I was trying to do is tell people to sit down and be quiet . . . so the executive board could get on with their session and I said I'm not conducting any new business at this meeting, period, and I said that from the start, but as far as being a meeting, there was a lot of disruption.

Keeble testified that Pope was "tearing the union to pieces" and creating schisms on the board. Witt testified that ever since Pope arrived at Local 268, the board was divided between his supporters and opposers. He was very concerned that the division was affecting the operation of the local union. Pat Sing, another board member, described Pope as being in complete control of some members of the board.

After the meeting, members of the board discussed what had occurred. They learned that Orr was in town and arranged to meet with her at a Hyatt Hotel in Knoxville. Orr advised them that they could ask the international union to place the local under trusteeship. The board members then wrote a letter, dated October 18, 1989, to the President of the OPEIU, John Kelly, requesting that he impose a "voluntary trusteeship" on Local 268. The letter explained that "certain individuals . . . are disrupting the operation" of the local union. The letter described the October 16 meeting and then stated, "We feel that the

problems are of such magnitude and urgency that for the good of our local we request immediate intervention . . . ."

On October 25, 1989, Kelly imposed an emergency trusteeship on Local 268 and assumed total control over the local through an appointed trustee, Donald Wright. The letter imposing the trusteeship explained:

> This action was taken for several reasons. Firstly, half of the members of the executive board of the Local requested it. Secondly, there was a schism in Local 268 that threatened the best interests of our members of that local. Thirdly, the executive board of the Local had become unstable. This instability resulted in the executive board being divided into factions. I received reports of these factions conducting executive board meetings on their own and attempting to set policy for the Local. Therefore, to provide greater stability and protect the best interest of the local members, the Local was placed in trusteeship.

A hearing was not conducted prior to imposing the trusteeship, but the letter informed the local president that a hearing would be held to determine whether the trusteeship was properly instituted and whether it should be discontinued.

According to Pope, in mid-November after the trusteeship was imposed, he asked trustee Wright what it would take to end the trusteeship. Wright allegedly answered, "Phillip, I believe if you would stand up and summons the members or tell the members that you are not going to run for president, I think we can get this trusteeship over in a hurry."

During the trusteeship, Pope expressed his opinion that the trusteeship was improper and illegal. When he expressed this opinion to Wright, Wright in response told him that

> he ought to stay out of the . . . politics . . . of his opinion about the trusteeship while he was on work

> time during the day, and I don't care what he does on his time, that's his business, but as business representative, working under my direction, I directed him not to voice his feeling about an illegality or impropriety of the trusteeship because it had been imposed and I didn't want him to do that.

Shortly before the trusteeship hearing, Wright heard that Pope was telling the members that the hearing was going to be a "kangaroo court" because, in Pope's opinion, the outcome was a foregone conclusion. Wright told Pope

> that really makes the international union look bad, impu[gns] the integrity of it, of the international president, of the process, before anybody's gotten here, before anything's happened you're already putting this in our members' minds further dividing our own membership . . . I don't want you doing that . . . on your work time, as business representative . . . .

According to Wright, Pope responded that he was going to tell the members despite his request.

On December 5, 1989, the day of the hearing, Wright gave Pope a formal written reprimand dated December 4, 1989. President Kelly assured Wright that it was not a problem to give Pope a reprimand immediately before the hearing, but Pope viewed the reprimand as an attempt to prevent him from testifying because Wright gave it to him before the hearing, knowing that Pope was going to testify. The reprimand informed Pope that his activities since the imposition of the trusteeship "have continued to be a source of divisiveness within the membership of Local 268." The letter cited three specific examples of alleged misconduct: (1) Pope used his position as business representative "to persuade the membership that the trusteeship is illegal" thereby "escalat[ing] the schism in the membership"; (2) Pope's "efforts to encourage some other candidate from another Organization within the Salary Panel to run against the current Chairperson, Faye Orr from OPEIU. This could have caused OPEIU to lose an important and

influential position in bargaining with TVA which would have been detrimental to Local 268 and other OPEIU members who work for TVA"; and (3) Pope told members that the hearing would be a "Kangaroo Court" thereby "impugn[ing] the integrity of the International Union, the International President and the Hearing officer." The letter then concluded with:

> These examples, along with the previous problems which helped to cause the problems leading to the trusteeship must stop immediately. Further occurrences of this type of activities will lead to disciplinary action. I expect your efforts to be devoted to serving the needs of Local 268 members, and not to continue to divide them.

The hearing was conducted before, L.J. Sheridan, the OPEIU Vice-President. Sheridan heard various persons testify in favor of and against the trusteeship. Pope and many members of the local believed that the hearing was conducted unfairly. They testified that Sheridan permitted the supporters to testify much longer than the opposers and was significantly more suspicious of the opposers. Wright and Orr testified in favor of the trusteeship. Prior to issuing his formal report, Sheridan sent Wright a copy of the report with a memo. The memo read: "Enclosed *rough* draft of report -- need your comments & feel free to add/delete -- *please*. Any negative or smart ass comments about typing will be considered contempt of 'de judge' -- and dealt with severely." (Emphasis in original.) The final report concluded that the imposition of the trusteeship was proper.

After the hearing, Wright allegedly told Pope that "it would be best for you to move on." He also told him "you have a good reputation in the labor movement . . . and you ought to resign now," and "if you sue us you would never get another job in the labor movement . . . you've got a chance to resign, I haven't expelled you yet." Wright fired Pope on February 8, 1990. Wright told Pope that his termination was due to "incompatibility with the Local."

Shortly after his termination, Pope was issued a union membership withdrawal card without notice or an opportunity to be heard; Pope did not request the card. Pope understood this action to mean that he was ineligible to run in any upcoming elections. Pope's job was offered to Ronald Hutson. Hutson refused the job when he received a phone call threatening his children, a call which the OPEIU alleges was made by Pope. On the same day that he received the call and refused the position, Hutson was assaulted in a parking garage.

In a trusteeship report to President Kelly written on February 10, 1990, Wright recommended that "we not hold nominations immediately, but wait a month or so to let things calm down some while the slate of 'non-Pope' candidates are [sic] gaining followers. It might also look better as far as Pope's situation . . . ." While the trusteeship was still imposed, the OPEIU proposed a merger of Local 268 with Local 119 in Chattanooga, Tennessee. The first vote approved the merger proposal. However, Pope supporters complained that the union's unilateral merger proposal was improper under the union's international constitution. Due to the members' challenges and the OPEIU's concern of low voter turnout, the OPEIU allowed a second vote on the merger proposal; the proposal failed.

President Kelly recommended at a January 1991 OPEIU meeting that the trusteeship be lifted. Elections were scheduled to take place in April 1991. Davenport, a Pope supporter, ran as the leader of the reform ticket; the OPEIU did not allow Pope to run for office because he was not a member of the union. In preparation for this election, various officers of the OPEIU used the TVA's internal mail system to circulate campaign materials. The reform slate was denied the right to use the TVA internal mail system. Wright, the trustee, after speaking with Orr and Thomas Addington of TVA labor relations, informed Pope that it was improper to use the TVA mail system for personal material. The contract between the TVA and the Salary Policy Employee Panel provides, in pertinent part:

"Mail between TVA and the representatives of recognized unions and mail between representatives or members of recognized unions may be transmitted through TVA interoffice mail."

The Davenport slate was elected and the trusteeship was lifted on April 30, 1991, 18 months and 5 days after it was imposed. The new board reinstated Pope as business representative.

Before the trusteeship was lifted, Pope and several other plaintiffs filed suit in the United States District Court for the Eastern District of Tennessee under the LMRDA, 29 U.S.C. § 401 *et seq.*, alleging that the trusteeship was imposed for an improper purpose. Plaintiffs sought monetary, injunctive, and declaratory relief. Pope alleged that his termination and expulsion from the union violated his rights under Title I of the LMRDA. The district court dismissed the damage claims of all the plaintiffs except for Pope ruling that he was the only plaintiff that could claim a measurable monetary loss. After the elections took place in April 1991, the district court held that the plaintiffs' claims for injunctive and declaratory relief as to the imposition of the trusteeship and the merger were moot and therefore dismissed the claims. Thus, Pope remained as the only plaintiff in the case.

Prior to trial before a magistrate judge, the defendant moved to exclude all evidence regarding the validity of the trusteeship on the following grounds: (1) the plaintiffs' claims for injunctive and declaratory relief as to the imposition of the trusteeship and the merger were dismissed; (2) Pope should not be able to put on evidence regarding the purpose of the trusteeship because the validity of the trusteeship was ruled moot by the district court; and (3) the validity of a trusteeship must be decided by a judge, not a jury. The magistrate judge denied the motion ruling that, because Pope alleged that his Title I rights were violated when the OPEIU imposed the trusteeship to quell democracy, the appropriateness of the trusteeship is still at issue.

The case was heard by a jury over fourteen days. During the trial, the magistrate judge ruled that letters written by the Department of Labor to the OPEIU regarding the trusteeship were inadmissible under Rule 803(8)(C) of the Federal Rules of Evidence. The magistrate judge later reversed his ruling, *sua sponte*, in a memorandum to counsel and allowed the letters to be entered into evidence. Also during the trial, the court granted a judgment as a matter of law in favor of Pope on the issue of whether Pope's due process rights under 29 U.S.C. § 411(a)(5) to be given written charges, time to prepare his defense, and a full and fair hearing before being removed involuntarily from union membership, were violated.

The jury found in favor of Pope, and awarded him $100,000 in compensatory damages and $1 in damages for expulsion from union membership under section 411(a)(5). The jury also assessed $100,000 in punitive damages against the OPEIU. In a special verdict form, the jury found as follows: (1) Pope was involuntarily removed from union membership in retaliation for the exercise of his right guaranteed by 29 U.S.C. § 411(a)(1) to participate equally with the other union members in union affairs and elections; (2) Pope was involuntarily removed from union membership in retaliation for the exercise of his free speech and assembly rights guaranteed by 29 U.S.C. § 411(a)(2); (3) Pope did not prove by clear and convincing evidence that the trusteeship was *imposed* for the purpose of interfering with the plaintiff's free speech and assembly rights, or his right, with other union members, to participate equally in union affairs and elections; (4) Pope proved by clear and convincing evidence that the trusteeship was *maintained* for the purpose of interfering with the plaintiff's free speech and assembly rights, or his right, with other members, to participate equally in union affairs and elections; and (5) Pope proved by clear and convincing evidence that his termination as a union employee was part of a scheme by the defendant to suppress the right of free speech and assembly and the right

to participate equally in union elections and affairs within the union.

The OPEIU filed a motion for judgment notwithstanding the verdict, now called a judgment as matter of law, and/or a new trial and to set aside the punitive damages award. The court denied the motion. The OPEIU appeals and urges this court to reverse.

II.

The OPEIU's first assignment of error alleges that Pope impermissibly recovered under the LMRDA as Pope is not a person whom the LMRDA is designed to protect. The OPEIU bases its argument on two grounds. First, the OPEIU argues that Pope was not a "legal" member of Local 268 because Pope's job description "required" Pope to be a member of the union and an employer may not impose membership as a condition of employment unless certain stringent requirements are met that are not met in this case.

Because the district court addressed this claim in its ruling on the OPEIU's motion for a new trial and judgment notwithstanding the verdict, this court must review the judgment using the same standard used by the district court. "'[T]he evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor.' . . . If the evidence 'points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.'" *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991) (quoting *Ratliff v. Wellington Exempted Village Sch. Bd. of Educ.*, 820 F.2d 792, 795 (6th Cir. 1987)).

To support its claim that Local 268 impermissibly forced Pope to become a member of the union, the OPEIU cites to *NLRB v. Michigan Conference of Teamsters Welfare Fund*, 13 F.3d 911 (6th Cir. 1993). *Michigan Conference* set forth the rule that an employer violates sections 8(a)(1), (2) and (3) of the National Labor Relations Act, 29 U.S.C.

§ 158(a), when it conditions employment on membership in a union which was never designated by a majority of employees as their chosen representative. *Id.* at 916. A union-employer may condition employment on membership in such a union only if the employer can demonstrate that (1) the "membership impacts job performance"; and (2) the employer "affirmatively notifies employees that the requisite membership does not impact their right to choose another union to bargain on their behalf." *Id.* at 917.

The OPEIU's argument fails for two reasons. First, Pope's job description simply states that the business representative "should be" a dues-paying member of the OPEIU Local 268. Pope's understanding was that this provision did not require him to join the local union. His understanding was confirmed during his interview for the position when Witt informed Pope that he should join the union but that he would not force him to become a member.

Second, the *Michigan Conference* rule is inapplicable to the case at hand. The *Michigan Conference* rule applies when an employer forces an employee to join a union which has not been elected by a majority of the employees. This is simply not the case at hand. Local 268 and the OPEIU were the majority's chosen representative. Thus, Pope was not forced into joining a union that was not chosen as the representative.

As its second ground, the OPEIU claims that the LMRDA is designed to protect only "rank and file" union members, not union officers and employees. The OPEIU argues that Pope was an appointed employee of Local 268 and therefore not permitted to bring an LMRDA suit.

The Supreme Court in *Finnegan v. Leu*, 456 U.S. 431 (1982), discussed standing to sue under Title I of the LMRDA. The plaintiffs in *Finnegan* were discharged from their positions as paid business agents after the incumbent president, for whom they campaigned, lost his bid for reelection. *Id.* at 433-34. The plaintiffs claimed that being dismissed for supporting a losing candidate constituted

"discipline" for the exercise of their right of free speech under the LMRDA. *Id.* at 437. The Court rejected their claim by distinguishing between the plaintiffs' rights as members of the union and their rights to employment in appointed positions. The Court concluded that the latter was not protected by the LMRDA. *Id.* at 439. The Court reasoned that the purpose of the LMRDA was "to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. The Court added that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Id.*

In *Sheet Metal Workers' International Association v. Lynn*, 488 U.S. 347 (1989), the Supreme Court addressed whether an elected business agent is protected by the LMRDA. In *Lynn*, an international union imposed a trusteeship on one of its locals to alleviate a financial crisis. The trustee proposed a dues increase during a special meeting with the members. Lynn, an elected business representative, outspokenly opposed the dues increase. *Id.* at 350.

The proposal was defeated. Five days later, the trustee informed Lynn that he was being terminated due to his "outspoken opposition to the dues increase." *Id.* Lynn filed suit against the union under Title I of the LMRDA. The Court distinguished the case before it from *Finnegan*. The Court explained that in *Finnegan*, the goal of the LMRDA "'to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections" was furthered when the newly elected president terminated the staff of the previous incumbent board. *Id.* at 354 (quoting *Finnegan*, 456 U.S. at 441). The Court recognized that the termination in *Finnegan* "had some chilling effect on the [business agents'] free speech" but that the effect was "outweighed by the need to vindicate the democratic choice made by the union electorate." *Id.* at 355. The Court

noted that the consequences that ensue when an elected official is removed are much different. First, when an elected official is removed, "the union members are denied the representative of their choice." *Id.* Second, the Court believed that the chilling effect is much more pronounced when an elected official is discharged. The Court stated that

> [n]ot only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him. . . . Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues increase proposal, other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril. This is precisely what Congress sought to prevent when it passed the LMRDA.

Id. (footnote omitted). The Court therefore held that retaliatory action taken against an elected official is actionable under the LMRDA. *Id.*

Subsequent to the Supreme Court's decision in *Finnegan*, this circuit faced a case similar to this one, but with one major distinction that makes a great deal of difference. In *Cehaich v. International, UAW*, 710 F.2d 234 (6th Cir. 1983), Cehaich, an employee of General Motors, was appointed to a position as benefits representative for a local unit of the international union. Cehaich was also a member of the union. After his appointment, the national union negotiated a new collective bargaining agreement with General Motors. *Id.* at 236. The agreement was presented at a meeting with union members. During the meeting, Cehaich expressed opposition to the agreement and distributed a leaflet opposing the agreement. Immediately after the meeting, Cehaich was fired from his position as benefits representative, *id.*, *but remained a member of the union*. Cehaich filed suit under the LMRDA. The court held that Cehaich was not entitled to protection under the LMRDA because he "was not disciplined in any manner which affected his right to fully enjoy the rights and

privileges of union membership." *Id.* at 240. The court noted that Cehaich was both a member of the union and an officer and that these were distinct roles that did not necessarily affect each other. *Id.* at 238. The court further noted that his status as a member of the union did not change after he was terminated from his appointed position. He was not fined, suspended, expelled or disciplined. *Id.*

The Tenth Circuit in *Gesink v. International Association of Machinists and Aerospace Workers*, 831 F.2d 214 (10th Cir. 1987), held that a plaintiff is protected by the LMRDA when his membership rights in a union are affected by a union's actions. *Id.* at 217. The Tenth Circuit defines membership rights as including the right to run for office. *Id.*

Pope's situation does not fall neatly within either *Finnegan* or *Lynn*. However, it can be reconciled with both cases. The Supreme Court has articulated that the purpose of the LMRDA is "to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan*, 456 U.S. at 441. This is a theme that runs through both *Finnegan* and *Lynn* and dictates the outcome of both cases. In *Finnegan*, the appointed officials of an ousted board were not protected by the LMRDA, because the union members elected a new board. In *Lynn*, the elected officials were protected because they had been elected by the union members. The purpose of ensuring democracy is furthered by allowing Pope a cause of action under the LMRDA. Pope was appointed business representative by an elected local executive board. That board was not ousted as in *Finnegan*. Moreover, unlike *Cehaich*, Pope was expelled from union membership immediately after his termination from his position as business representative. Thus, Pope's case is clearly distinguishable from *Cehaich*. Pope is entitled to protection under the LMRDA because he was disciplined in a manner which affected his right to fully enjoy the rights and privileges of union membership.

III.

In addition to the standing argument, the OPEIU makes two additional arguments as to why the jury should not have heard this case. First, the OPEIU contends that it is well-settled law that once a trusteeship has been lifted, questions regarding the validity of the purposes for which it was imposed or maintained are moot. The OPEIU argues that the district court's distinction between deciding the validity of a trusteeship and deciding whether a trusteeship was imposed or maintained for an improper purpose is a meaningless distinction. The OPEIU believes that deciding whether a trusteeship was imposed for an improper purpose is determining its validity. Second, the OPEIU contends that the propriety of the reasons for imposing and maintaining a trusteeship is a question for the court, not the jury. We review this question of law *de novo*.

Title III of the LMRDA, 29 U.S.C. § 461 *et seq.*, governs the imposition of trusteeships. Section 462 instructs labor organizations as to when the imposition of a trusteeship is appropriate. That section reads:

> Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

29 U.S.C. § 462.

Title III attaches a presumption of validity for a period of eighteen months to trusteeships that have been imposed in conformity with the procedural requirements of the labor organization's constitution and bylaws and authorized or ratified after a fair hearing. The trusteeship is not subject

to attack during those eighteen months except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462. After eighteen months, the trusteeship is presumed invalid unless the labor organization can show by clear and convincing evidence that the continuation of the trusteeship is necessary for a purpose allowable under section 462. 29 U.S.C. § 464(c).

Although not expressed in the statute, some circuits have held that once a trusteeship has been lifted, questions regarding the validity of the purposes for which the trusteeship was imposed or maintained are moot. *See, e.g., Laborers' Int'l Union v. National Post Office Mail Handlers*, 880 F.2d 1388, 1393 (D.C. Cir. 1989); *Air Line Stewards & Stewardesses Ass'n, Local 550 v. Transport Workers Union*, 334 F.2d 805, 808 (7th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965).

Title III of the LMRDA is designed to protect a subordinate union as a whole, whereas Title I, often called the "Member's Bill of Rights," is designed to protect the individual rights of the members of a union. Section 411 provides, in part:

> **(a)(1) Equal rights**
>
> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> **(2) Freedom of speech and assembly**
>
> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor

> organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings . . . .

29 U.S.C. § 411(a)(1), (a)(2).

The Supreme Court has not expressly decided whether evidence surrounding the imposition and maintenance of a trusteeship may be submitted to a jury in a Title I case. However, in *Lynn*, 488 U.S. 347, the Court found "nothing in the language of the LMRDA or its legislative history to suggest that Congress intended Title I rights to fall by the wayside whenever a trusteeship is imposed." *Id.* at 356. Given this finding, the Court concluded that "a trustee's authority under Title III ordinarily should be construed in a manner consistent with the protections provided in Title I." *Id.* at 357. In addition, in discussing a member's Title I right to vote on dues increases, the court stated that "this critical Title I right does not vanish with the imposition of a trusteeship." *Id.* at 358.

As least one district court has held that the lifting of a trusteeship does not preclude a union member from seeking damages against a local and international union under Title III of the LMRDA for imposing a trusteeship in order to prevent him from assuming an elected position as business representative. *Pruitt v. United Bhd. of Carpenters and Joiners of Am.*, 659 F. Supp. 1511, 1520 n.11 (N.D. Ga. 1987), *vacated on other grounds*, 893 F.2d 1216 (11th Cir. 1990).

The OPEIU's position is untenable. If evidence regarding the imposition or maintenance of a trusteeship after it has been lifted were inadmissible, national and international unions could impose trusteeships with impunity, including as a means to suppress Title I rights, and remain immune from legal scrutiny as long as they lifted the trusteeship before the plaintiff has his day in court. The Supreme Court has expressed its view that Title I individual rights are not suspended during a trusteeship.

If the OPEIU's position were to prevail, Title III would trump Title I rights.

Furthermore, the OPEIU's argument carries the mootness doctrine to an illogical end. Courts holding that questions regarding the validity of trusteeships ordinarily are moot once the trusteeship is lifted are merely following the case or controversy requirement of Article III of the United States Constitution. When a plaintiff sues for injunctive and/or declaratory relief once a trusteeship has been lifted, obviously there is no longer any relief to be had. However, in this instance, there is no risk of issuing an advisory opinion. The question of the propriety of the trusteeship is not moot because it has direct bearing on whether Pope's Title I rights were violated. Pope is not simply seeking to lift a trusteeship or declare a trusteeship invalid after it has been lifted.

The OPEIU's argument that the propriety of imposing and maintaining the trusteeship is a question that may not be submitted to a jury is also mistaken. This is not an equitable action seeking solely a determination whether a trusteeship has been validly imposed. Rather, this is an action at law to recover damages for the suppression of Title I rights as a result of the imposition of a trusteeship.

Thus, it was not error for the district court to rule that evidence regarding the imposition and maintenance of the trusteeship could be submitted to the jury.

IV.

During the trial, Pope sought to introduce various letters written by officials of the Department of Labor. The magistrate judge initially ruled that the documents were inadmissible. However, he *sua sponte* reversed his ruling in a written memorandum to counsel. In the memorandum, he ruled that the letters were admissible under Rule 803(8)(C), the public records and reports exception to the hearsay rule.

The documents at issue are plaintiff's exhibits 197, 198, 199, and 200. Exhibit 197 is a letter to President John Kelly from Richard Hunsucker, the Director of the Office of Elections, Trusteeships and International Union Audits of the Department of Labor. The letter informs Kelly that the Department of Labor conducted an investigation into the Local 268 trusteeship and then states:

> In that no hearing was conducted within 30 days per Article XV, Section 2f, the validity of the trusteeship imposition may be in doubt, ab initio.
>
> However, without consideration for any such procedural flaws, the trusteeship may be invalid for another reason. The International Union has failed to demonstrate to [the Office of Labor-Management Standards] that the trusteeship was imposed for a reason which is valid under the statute. Our investigation did not determine that the local had been guilty of failing to follow democratic procedures in any manner contemplated by Title III. The other cited reason for imposition, to correct instability and factionalism, is not a valid purpose under Section 302 of the LMRDA.
>
> . . . Even if the trusteeship imposition is presumed to be procedurally valid, there appears to be clear and convincing evidence that it was imposed and is being continued for purposes other than those allowable under Section 302.
>
> . . . .
>
> A final determination based on the investigation and any information you submit will be made in the near future.

Exhibit 198 is another letter written by Hunsucker to President Kelly. This letter was written to Kelly after the general counsel of the OPEIU, Joseph Finley, wrote a memorandum to the Department of Labor justifying the

imposition of the trusteeship. In this letter, Hunsucker writes:

> [Finley] has made several strong arguments in attempting to justify the trusteeship's imposition.
>
> Mr. Finley's arguments notwithstanding, a troublesome situation still remains. Most of the individuals within Local 268 who were prominently involved in the so-called "schism" are no longer active or even members of Local 268. . . . [N]o trusteeship can continue indefinitely simply because all of the members of the subordinate body are not of like mind; a virtual impossibility in a democratic organization. Without conceding that the imposition of the trusteeship was ever valid, the Department's position is that its continuation at this time is certainly for no legitimate purpose. In fact, the continuation serves to deprive the membership of Local 268 of the officer election to which it was entitled in December 1989.
>
> A final decision concerning action by the Department of Labor to require the termination of the trusteeship over Local 268 has not yet been made.

The OPEIU does not discuss exhibits 199 and 200; Pope describes exhibits 199 and 200 as "merely concern[ing] the timing and circumstances under which OPEIU was to conduct Local elections and lift its trusteeship." There are two letters written by Hunsucker to Kelly in the record that fit this description. The first acknowledges receipt of a letter written by Kelly informing Hunsucker that he planned to lift the trusteeship. Hunsucker writes that the Department of Labor will hold in abeyance plans for litigation if four conditions are met which are set out in the letter. The second letter acknowledges receipt of a letter written by Kelly outlining the steps that the OPEIU was planning to take to lift the trusteeship. Hunsucker then writes that, in his opinion, Pope would be eligible to run for office in the upcoming elections despite his termination.

The OPEIU argues that the district court committed prejudicial error when it admitted the letters from the Department of Labor regarding the validity of the Local 268 trusteeship. The OPEIU contends that these letters do not satisfy Federal Rule of Evidence 803(8)(C), the public records and reports exception to the hearsay rule, in that the letters do not satisfy the trustworthiness requirement of 803(8)(C).

Rule 803(8)(C) allows certain public records and reports to be admitted into evidence as an exception to the hearsay rule. Rule 803(8)(C) provides, in pertinent part:

> **(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Such reports are not rendered inadmissible because they contain facts, conclusions, or evaluations. *Bank of Lexington v. Vining-Sparks Sec., Inc.*, 959 F.2d 606, 616 (6th Cir. 1992). "[T]he party opposing the admission of the report[s] must prove that the report is not trustworthy." *Id.* To determine whether a report is trustworthy, a court should consider four factors as set out by the Advisory Committee: "(1) the timeliness of the investigation, (2) the special skill or experience of the investigators, (3) whether the agency held a hearing, and (4) possible motivational problems." *Id.* No one factor is dispositive. *Id.* at 617.

The admissibility of the first two letters cannot be challenged on appeal because the OPEIU moved to admit those letters into evidence. The second two letters should not have been admitted as they were not "[r]ecords, reports, statements, or data compilations . . . setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law." However, we cannot say that any substantial rights of the OPEIU were

affected. Thus, we regard the error as harmless. *See* Fed. R. Evid. 103.

V.

The OPEIU also challenges the verdict as not supported by sufficient evidence. The OPEIU argues that Pope did not prove by clear and convincing evidence that he was discharged as the result of a purposeful and deliberate attempt to suppress dissent. It gives three reasons: (1) the evidence was overwhelming that Pope was fired for legitimate reasons, namely his disruptive and insubordinate conduct; (2) free speech, assembly, and dissent flourished throughout the trusteeship, including after Pope was discharged, and there was never a single act by the OPEIU to attempt to suppress anyone's right to speak; and (3) there was no evidence other than Pope's discharge from which a reasonable jury could have found a plan to suppress dissent.

This court reviews a motion for judgment as a matter of law using the same standard used by the district court. "'[T]he evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor.' . . . If the evidence 'points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.'" *Marsh*, 937 F.2d at 1060 (quoting *Ratliff*, 820 F.2d at 795).

To establish a violation of Title I rights, the plaintiff must prove the following elements: (1) the plaintiff's conduct was an exercise of free speech as defined and protected by Title I; (2) the defendant took actions against the plaintiff in substantial part because of this exercise of his Title I rights; and (3) the plaintiff was damaged and suffered an injury as a proximate result of the defendant's actions. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461, 1469 (6th Cir. 1992).

If the plaintiff proves these three elements, he has established his *prima facie* case. The defendant may overcome the *prima facie* case by proving the following affirmative defense by a preponderance of the evidence: "It [is] lawful for a union to discipline a member for a violation of a union's reasonable rules. A union may reasonably regulate speech and assembly which is part of the pattern of conduct designed to destroy the union and interfere with the performance of its legal obligations." *Id.*

We conclude that the jury verdict was supported by sufficient evidence. A rational trier of fact could find that the trusteeship was maintained to suppress protected Title I speech. The evidence strongly suggests that the trusteeship was maintained to prevent Pope and his supporters from democratically gaining control of the executive board. Some of the most damaging evidence is as follows: (1) in a trusteeship report dated February 10, 1990 to President Kelly, Wright advised Kelly that he was going to interview to fill the business agent position and wrote, "[i]f it goes well, I will make him an offer with a one year contract to influence Pope to move on"; (2) in the same report, Wright suggested that "we not hold nominations immediately, but wait a month or so to let things calm down some while the slate of 'non-Pope' candidates are [sic] gaining followers"; (3) despite warnings from the Department of Labor that the trusteeship was likely improper, the OPEIU maintained the trusteeship; (4) in mid-November after the trusteeship was imposed, Pope asked trustee Wright what it would take to end the trusteeship. Wright allegedly answered, "Phillip, I believe if you would stand up and summons the members or tell the members that you are not going to run for president, I think we can get this trusteeship over in a hurry"; and (5) the OPEIU would not let Pope run as a candidate in the 1991 elections. In light of this evidence, the district court did not err in refusing to grant a judgment as a matter of law after the jury rendered its verdict.

VI.

The OPEIU also challenges the district court's directed verdict for Pope on the issue of whether Pope's rights were violated when he was issued a withdrawal card after he was terminated. The OPEIU cites to the OPEIU constitution and the local constitution which provide that unless a member is working for an employer who bargains with a local or the international, or is an employee or officer of any local of the international of its affiliates, that member shall be issued a withdrawal card and will then no longer be a member until that individual resumes work within the jurisdiction of any local or resumes employment or office with any local or the international. Under this provision, the OPEIU argues, it was proper to issue Pope a withdrawal card. It argues that Pope was not entitled to notice and a hearing because 29 U.S.C. § 411(a)(5) provides that notice and a hearing is required only when a member is "fined, suspended, expelled, or otherwise disciplined." The OPEIU argues that because Pope was merely terminated, he was not entitled to notice and a hearing.

29 U.S.C. § 411(a)(5) governs the procedures with which a labor organization must comply before taking action against a member. Section 411(a)(5) provides:

> **(5) Safeguards against improper disciplinary action**
>
> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Regarding withdrawal cards, Article XXI, section 1(b) of the OPEIU constitution states, in part:

> Whenever any member is not in the employment of any employer who bargains with any Local Union or

> the International Union, the Local Union shall issue a withdrawal card to such member . . . . This subsection shall not apply to any member who holds office in, or is employed by, the International Union, any of its Local Unions or Councils . . . .

A straightforward application of section 411(a)(5) supports the district court's granting of a judgment as a matter of law on this issue. As a member of the union, Pope was entitled to notice and a hearing before being expelled from the union. There can be no doubt that the issuance of a withdrawal card is the equivalent of expulsion from the union. The OPEIU contends that, under its constitution, an employee who is no longer employed with an employer who bargains with any local union or the international union, must automatically receive a withdrawal card and is therefore not entitled to the protections of section 411(a)(5). However, that same constitutional provision states that the provision does not apply to any member who holds office in, or is employed by, the international union or one of its locals.

VII.

The Sixth assignment of error challenges the jury's award of emotional distress damages. The OPEIU argues that the district court erred in denying its motion for judgment notwithstanding the verdict regarding the jury's award of emotional distress damages. The OPEIU contends that a significant part of the compensatory damages awarded to Pope must have been for emotional distress damages because Pope offered evidence of only $20,900 in lost wages and benefits and $12,000 in other economic costs. The OPEIU claims that there was insufficient evidence of physical manifestations of distress.

Generally, this circuit allows damages for emotional distress to be awarded "upon a showing of intimidation, marital problems, weight loss, loss of sleep, shock, or humiliation." *Holmes v. Donovan*, 984 F.2d 732, 739 (6th Cir. 1993).

Evidence of Pope's emotional distress was elicited through the testimony of his wife. Bingham Pope testified that beginning in December 1989, two months after the trusteeship was imposed, Phillip Pope was not sleeping well. She testified that he would often wake up in the middle of the night. She also remembered that her husband "was on pins and needles" and nervous when he went to work. In January 1990, she stated that her husband visited the doctor for chest pains, however, she noted that Pope had a history of high cholesterol. She further testified that after her husband was fired, he became depressed and gained weight. She stated that Pope became obsessed with trying to clear his name. Bingham Pope also recalled an evening when her husband came home from a Central Labor Council meeting and told her that the Council told him that he could not sit for the meeting because he was no longer an OPEIU representative. She said that he was trembling and there were tears in his eyes when he told her the story. She thought he had been publicly embarrassed and humiliated. She said that she had only seen him cry two or three times before that evening and that normally he was not a very emotional person.

This evidence meets the general standard that this court applies, as the evidence showed that Pope suffered from a loss of sleep, weight gain, and embarrassment. The OPEIU claims that this court should consider only such injuries as Pope may have suffered after his termination. But since we have determined that the jury properly considered the issues regarding the imposition and maintenance of the trusteeship, it was proper for the jurors to consider the injuries Pope may have suffered during that time as well.

VIII.

The OPEIU also challenges the punitive damages award. The union claims that the punitive damages award must be set aside because there was no evidence that Pope's discharge was carried out maliciously, recklessly, or with wanton indifference.

The LMRDA does not expressly authorize or preclude punitive damage awards. Many circuits do allow punitive damage awards for violations of the LMRDA, but only upon some showing of malice or ill will. For example, the Eighth Circuit permits punitive damages where the "union or its officials maliciously violate a plaintiff's rights." *Schmid v. United Bhd. of Carpenters & Joiners of Am.*, 827 F.2d 384, 386 (8th Cir. 1987), *cert. denied*, 484 U.S. 1071 (1988). The District of Columbia Circuit has stated that punitive damages "should be imposed only in the most egregious cases, in which the conduct of the union or its officers was malicious--motivated by ill will or a purpose to harm the plaintiff's interests." *Quinn v. DiGiulian*, 739 F.2d 637, 651 (D.C. Cir. 1984). The Ninth Circuit allows punitive damages upon a showing that the defendant acted with malice or reckless or wanton indifference to the plaintiff's rights. *Bise v. International Bhd. of Elec. Workers*, 618 F.2d 1299, 1305 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980).

In light of the evidence presented in this case, a reasonable trier of fact could have found that the OPEIU acted with malice or with reckless or wanton indifference to Pope's rights. As discussed, *supra*, there were several pieces of evidence presented which suggest that the OPEIU wanted to prevent Pope and his supporters from gaining control of the local board at any expense without regard to Pope's Title I rights. We think the district court did not err in refusing to set aside the punitive damages award.

IX.

Lastly, the OPEIU challenges the failure of the district court to grant a mistrial based on contacts between Pope and the jury foreman. During a lunch break on one of the days of the trial, the foreman of the jury was walking towards the front of a restaurant to pay his bill when Pope was in line to be seated. Pope asked the juror, "how is the food?" The juror responded, "tolerable." Those were the only words exchanged between the juror and Pope. The OPEIU moved for a mistrial based on this incident. The

court asked if the OPEIU wanted the court to call in the juror to be questioned about the incident. The OPEIU declined. Thereafter, the court denied the motion ruling that it would be too drastic a solution and then told Pope that speaking to a juror "was not a good thing to do." The court reminded the parties that he already "instructed th[e] jury that anything that occurs outside of this courtroom is to be disregarded by them with regard to the merits of the case" and offered to give the jury another cautionary instruction if requested by the parties.

We review the district court's decision not to grant a mistrial for alleged unauthorized contact with jurors for abuse of discretion. *United States v. Pennell*, 737 F.2d 521, 533 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985). This court has held that an "abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." *United States v. Winston*, 37 F.3d 235, 239 (6th Cir. 1994) (citing *United States v. Chambers*, 944 F.2d 1253, 1263 (6th Cir. 1991), *cert. denied*, 502 U.S. 1112 (1992), *and cert. denied*, 503 U.S. 989 (1992)).

The OPEIU argues that the district court erred in denying the motion for a mistrial because the mere appearance of impropriety compels a new trial. The OPEIU urges this court to follow the language in *Budoff v. Holiday Inns, Inc.*, 732 F.2d 1523 (6th Cir. 1984), which instructs courts that there are certain cases where the mere appearance of impropriety compels a new trial as a prophylactic rather than a remedial measure. However, later cases have limited *Budoff*'s general language to the specific facts in *Budoff*. *See United States v. Marshall*, 767 F.2d 293, 295 (6th Cir. 1985). If a case does not fall within the narrow confines of the *Budoff* rule, a party, in order to receive a new trial, must prove that actual prejudice resulted from the contact with the juror. *Budoff*, 732 F.2d at 1525-26.

In *Budoff*, plaintiff counsel's daughter, who was a paralegal for her father and present in the courtroom throughout the trial, contacted the son, a friend of hers, of

one of the jurors and discussed the merits of the case. *Id.* at 1525. *Budoff* held that "a new trial should be ordered when contact with a juror is purposely made by counsel or his employee." *Id.* at 1527.

In *United States v. Mitchell*, 590 F.2d 816 (6th Cir. 1979), the defendant claimed that the district court should have granted a mistrial where a juror during a trial recess was preparing to enter an elevator in which one of the defendants was riding. The defendant asked the juror if she was afraid to ride the elevator with him. The juror simply refrained from riding the same elevator with the defendant. *Id.* at 816. The court conducted an *in camera* hearing which was not recorded. The defendant challenged both the failure to grant a mistrial and the failure to record the hearing. *Id.* at 817. In its holding, this court specifically addressed only the failure to make a record of the hearing and held that it was not error. The court then affirmed the judgment of the district court thereby implicitly approving of the court's decision that the contact was insufficient to grant a mistrial. *Id.*

The juror contact in this case was not sufficient grounds to grant a mistrial. The contact was not nearly as egregious as in *Budoff*, where a purposeful call was placed to a juror to discuss the merits of the case. Here, the contact was brief, incidental, and did not involve the merits of the case. The facts of this case are like those in *Mitchell* where the court implicitly held such insignificant contact to be insufficient grounds to grant a mistrial.

Moreover, it is highly unlikely that this brief contact with one member of the jury influenced the jury's verdict. Thus, the OPEIU has not proved that the conduct was prejudicial. In addition, the district court offered to take several cautionary measures of which the OPEIU refused to take advantage. The OPEIU did not want the juror questioned and did not request a cautionary instruction to the jury. The district court, therefore, did not abuse its discretion in refusing to grant a mistrial.

X.

Accordingly, the judgment of the district court is **AFFIRMED**.

PAUL R. MATIA, District Judge, concurring in part and dissenting in part. Although I agree with the majority's disposition of six of the eight issues raised in this appeal, I respectfully dissent as to two: (1) whether Pope has standing to bring a claim under the LMRDA for his firing, and (2) whether the district court erred in directing a verdict for Pope on the issue of whether his union membership rights were violated when he was issued a withdrawal card after he was fired as business representative.

With respect to these issues, it is important to understand his status within the local union. Local 268 of the OPEIU represents employees at companies such as the Tennessee Valley Authority and Baptiste Hospital. Although Pope was not a member of either Local 268 or the OPEIU and had no prior association with either, he was employed by Local 268 as a business representative. There is no dispute that the evidence shows that Pope was not and had never been employed by any employer covered by a bargaining agreement with Local 268. Pope subsequently became a member of Local 268 solely by reason of his status as an employee of Local 268.

The United States Supreme Court has held that removal from *appointive* union employment is not actionable under either section 609 or Title I of the LMRDA, but that an *elected* union official does have a right of action under the LMRDA. *Finnegan v. Leu*, 456 U.S. 431 (1982); *Sheet Metal Workers' Intern. Ass'n v. Lynn*, 488 U.S. 347 (1989). *See also Tucker v. Bieber*, 900 F.2d 973 (6th Cir. 1990), and *Cehaich v. International Union, United Auto., Aerospace and Agr. Implement Workers of America*, 710 F.2d 234 (6th Cir. 1983). The majority opinion notes that the *Cehaich* case is "similar to this one, but with one major distinction that makes a great deal of difference." (Majority Opinion, p. 16) That distinction is that Cehaich remained a member of the union. In this case, Pope did not. That fact has apparently convinced the majority that Pope's case is clearly distinguishable from *Cehaich*, and that Pope is entitled to protection under the LMRDA because he was

disciplined in a manner which affected his right to fully enjoy the rights and privileges of union membership. I disagree. I would find that Pope has no standing to bring a claim under the LMRDA.

There are two distinct events which occurred in this case: (1) termination of Pope as appointed business representative, and (2) issuance to Pope of a membership withdrawal card. The first event--termination--is not actionable under *Finnegan*, *supra*, and its progeny. Nor is the second event actionable, because Pope was not "disciplined" within the meaning of section 411(a)(5) of the LMRDA when he was issued a withdrawal card.

Section 411(a)(5), 29 U.S.C., which governs the procedures with which a labor organization must comply before taking action against a member, provides:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

The term "member" is defined as follows in 29 U.S.C. § 402(o):

> "Member" or "member in good standing," when used in reference to a labor organization, includes any person *who has fulfilled the requirements for membership in such organization, and* who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization. (emphasis added).

Regarding withdrawal cards, Article XXI, section 1(b) of the OPEIU constitution and Article XX, section 3 of the Local 268 constitution contain the following provision:

> Whenever any member is not in the employment of any employer who bargains with any Local Union or the International Union, the Local Union shall issue a withdrawal card to such member . . . .

A similar withdrawal provision was upheld by this court in *Taylor v. Great Lakes Seamen's Union, Local 5000, United Steelworkers of America*, 701 F.2d 590 (6th Cir. 1983), wherein the court said that "we see nothing 'unreasonable' about a rule which, in effect, guarantees that internal union affairs will be governed by those whose interests are most at stake--workers presently employed in the . . . industry." *Id.* at 592.

The majority opinion holds that "[a]s a member of the union, Pope was entitled to notice and a hearing before being expelled from the union. There can be no doubt that the issuance of a withdrawal card is the equivalent of expulsion from the union." (Majority Opinion, pp. 30-31) I cannot agree. Pope was not "disciplined" within the meaning of section 411(a)(5) when he was issued a withdrawal card pursuant to the union constitution upon losing his sole claim to eligibility for membership. *See Department of Labor v. Aluminum, Brick and Glass Workers Intern. Union, Local 200*, 941 F.2d 1172, 1177 (11th Cir. 1991)(union officials did not "discipline" members within the meaning of section 411(a)(5) by excluding them from election voting for failure to satisfy one of the preconditions for member-in-good-standing status). Section 402(o) allows a union to establish requirements for membership which members must *continue* to fulfill at all times. Since Pope did not, he lost his eligibility for membership, and the issuance to him of a withdrawal card did not constitute "discipline."

The majority opinion claims that the withdrawal card provision quoted above does not apply to any member who

is employed by the union, based upon the following clause: "This subsection shall not apply to any member who holds office in, or is employed by, the International Union, any of its Local Unions or Councils . . . ." That appears to be an incorrect construction. I believe a correct interpretation of that clause requires the addition of the words "while such member holds office or is so employed." That this is the appropriate interpretation of this clause becomes apparent when the entire subsection is read:

> b. Whenever any member is not in the employment of any employer who bargains with any Local Union or the International Union, the Local Union shall issue a withdrawal card to such member, subject to the provisions of this section. This subsection shall not apply to any member who holds office in, or is employed by, the International Union, any of its Local Unions or Councils, any federation or council of labor organizations with whom the International Union or any of its Local Unions is affiliated, or any central body with whom any Local Union is affiliated, or to any member entitled to benefits under any health, welfare, or pension plan whose continued coverage is conditioned upon union membership, or to any member who, in the regular course of employment has become retired, or to any unemployed member seeking dispatch to a union job through the facilities of the Local Union.

Clearly, the withdrawal card provision is not punitive or disciplinary. It is a reasonable membership control mechanism to guarantee "that internal union affairs will be governed by those whose interests are most at stake--workers presently employed in the . . . industry." *Taylor*, 701 F.2d at 592.

Since Pope was not "disciplined" within the meaning of section 411(a)(5) when he was issued a withdrawal card upon losing his sole claim to eligibility for membership, he

has no legal ground for relief. Therefore, it was error for the district court to direct a verdict for Pope.

For all of the foregoing reasons, I must dissent from the majority's resolution of two of the eight issues.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:90-cv-669
(MURRIAN)

PHILLIP R. POPE,

Plaintiff,

v.

OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Defendant.

Filed Mar 08 3:45 PM '94

ORDER

For the reasons indicated in a Memorandum Opinion this date passed to the Clerk, it is **ORDERED** that the defendant's motion for "Judgment N.O.V. and/or For A New Trial And To Set Aside The Punitive Damages Award" be **DENIED.**

IT IS SO ORDERED.

ENTER:

/s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:90-cv-669
(MURRIAN)

PHILLIP R. POPE,

Plaintiff,

v.

OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Defendant.

Filed Mar 08 3:48 PM '94

MEMORANDUM OPINION

This case was referred to the undersigned pursuant to 28 U.S.C. § 636(c) and the Rules of this Court for all further proceedings, including entry of judgment. This case was tried before the undersigned and a jury over fourteen trial days between January 3 and February 1, 1994. The jury found in favor of the plaintiff and awarded him $100,000 in compensatory damages and $100,000 in punitive damages. Plaintiff was also awarded $1.00 in nominal damages for violation of his rights under 29 U.S.C. § 411(a)(5). Defendant moves for "Judgment n.o.v. and/or for a New Trial and to Set Aside the Punitive Damages Award" [Doc. 110]. The plaintiff has responded [Doc. 112]. For the reasons set out below, defendant's motion will be denied.

This case was brought under the Labor Management Disclosure and Reporting Act, 29 U.S.C. § 401, *et seq.*, based upon alleged violations of the following statutes:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C.§ 411(a)(1).

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meetings, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2).

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by

> any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5).

I.

This case raises interesting questions in regard to the relationship between an international union and one of its locals[1] and the treatment of a member of that local by the international union in the situation where that union member also happens to be an employee of the local.

A. Plaintiff's Contentions

The plaintiff, Phillip R. Pope, contended that he was affiliated with members of the defendant, Office of Professional Employees International Union ("OPEIU"), in an informal political caucus within Knoxville, Tennessee Local 268 of this union to elect a slate of officers, which slate was to have been headed by himself. He was an appointed business representative of Local 268, having been appointed to that position on June 1, 1988, until he was fired by the OPEIU trustee on February 8, 1990, and involuntarily removed from union membership without the benefit of notice or a hearing. The plaintiff contended that for several months prior to October 25, 1989, he and other members of Local 268, under his leadership, had organized and launched a political movement within the Local to reform it and to remedy various perceived constitutional violations by the

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[1] John Kelly, President of the OPEIU, testified in his deposition that the OPEIU is comprised of over 250 local unions. Deposition, Feb. 26, 1991 at 12. At trial he testified that there are about 125,000 members of the OPEIU.

incumbent and prior leadership, including an unlawful dues increase. He contended that beginning on October 25, 1989, and thereafter, the defendant, acting through its president, John Kelly, began a campaign to subvert and suppress the democratic process in the local union by placing placed [sic] Local 268 in trusteeship, evicting all local officials from their elected positions, assuming total control over the Local, attempting to merge the local out of existence, and improperly trying to influence and control the democratic electoral process. Plaintiff contended that no emergency existed that might have justified such action without first affording the local notice and an opportunity for a fair hearing before the trusteeship was imposed.

The plaintiff contended that after imposition of the trusteeship, the defendant's representatives attempted to persuade him to renounce his intention to run for the local presidency during local elections scheduled for December 7, 1989, and to resign from his salaried position as the Local's business representative. Plaintiff contended that the defendant's trustee, Don Wright, stated to plaintiff that the trusteeship could be lifted if he were willing to abandon his leadership position within the Local.

The plaintiff contended that on December 5, 1989, a hearing was conducted before James Sheridan, an OPEIU vice-president appointed by John Kelly, to develop a record that would purportedly support Kelly's actions. He alleged that Kelly's handpicked trustee, Don Wright, presented Kelly's case against the Local and that the hearing officer Sheridan was biased; that the proceeding was a sham and charade; and that the outcome was assured before the hearing had begun. He contended that while the stated purpose for imposing, maintaining, or ratifying the trusteeship was to restore democracy in the Local, the actual reason was to

undermine a healthy democratic movement within the local by suspending democratic institutions and seizing autocratic control over the Local.

The plaintiff contended that on February 8, 1990, the defendant's trustee Wright terminated him from his salaried position as the Local's business representative and that the defendant summarily removed him from union membership without the benefit of a notice or a hearing as to either of these actions. He contended that subsequent efforts to pay his membership dues and to exercise his rights as a union member were rebuffed by the defendant and that he has appealed through all reasonable union procedures in an attempt to obtain relief but that these appeals have been denied.

The plaintiff contended that the defendant's actions in imposing and maintaining the trusteeship and other actions complained of were all taken for the purpose of undermining the democratic and constitutional rights of the Local 268 membership. The plaintiff further alleged that the 1989 trusteeship over the Local was not imposed for any legally permissible reason sanctioned by 29 U.S.C. § 462, but rather was imposed in bad faith to quell a democratic movement and to infringe the Title I rights of the Local's members, including this plaintiff, in violation of 29 U.S.C. § 464. Further, plaintiff contended that by imposing and maintaining the 1989 trusteeship, removing all of the Local's elected officers, subsequently terminating him from his position as business representative, involuntarily removing him from union membership, attempting to merge the local out of existence, and improperly trying to influence and control the democratic electoral process, the defendant OPEIU infringed his rights under 29 U.S.C. § 411(a)(1) and (2). Plaintiff contended that by involuntarily removing him from union

membership without benefit of notice or a hearing, the defendant infringed his rights under 29 U.S.C. § 411 (a)(5).

Plaintiff contended that he had suffered economic and emotional injury due to his improper termination and expulsion and further that the defendant's actions as stated above were willful, wanton, malicious, and taken for the illicit purpose and motive to violate his union constitutional and statutory rights under the Labor Management Reporting and Disclosure Act, entitling him to punitive damages from the defendant.

B. Defendant's Contentions

The defendant, OPEIU, denied any liability under 29 U.S.C. § 411(a)(1), (2) or (5). Defendant pointed out that it, and not Local 268, has a contract with the Tennessee Valley Authority ("TVA") which allows it and four other labor organizations to bargain collectively with TVA through a Salary Policy Employee Panel ("SPEP"). Plaintiff's Exhibit 177. Defendant contends that TVA is under no obligation to recognize a union for collective bargaining purposes since it is exempt from certain federal labor laws; that TVA has agreed to recognize the SPEP as the collective bargaining agent for certain of its salaried employees; that Mr. Pope's conduct interfered with the defendant's performance of its contractual obligations to TVA, *see* 29 U.S.C. § 411(a)(2); that Mr. Pope's conduct was disruptive of these contractual obligations in several ways including trying to unseat Faye Orr, as Chairperson of the SPEP (she was and is an international representative of the defendant union), trying to encourage members of the Local 268 to misuse the TVA internal mail system, and by doing other things which had the effect of destroying rapport between defendant and TVA.

The defendant contended that Mr. Pope was something less than a "real" member of the OPEIU because he never worked in any of the shops which Local 268 had organized (TVA, East Tennessee Baptist Hospital, and the Department of Energy at Oak Ridge, Tennessee). Defendant contended that his membership in the OPEIU resulted from a requirement in his job description as business representative for Local 268.

The defendant contended that Mr. Pope's activities in Local 268 in the months prior to the imposition of the trusteeship on October 25, 1989, paralyzed the local to such an extent that the democratic process no longer functioned in the local. *See* 29 U.S.C. § 462.[2] The defendant described the situation as a schism which had divided Local 268 into warring camps, one of which was led by Mr. Pope and the other led by most of the existing leadership of Local 268. The situation came to a head at an October 16, 1989, executive board/membership meeting of Local 268 which, by all accounts, was boisterous, chaotic, and unruly.

In the words of OPEIU President Kelly, the defendant came to the conclusion that Mr. Pope wanted to be "the leader, the king, the dictator [of Local 268], that was the issue." Deposition taken February 26, 1991, at 190. Defendant came to view Mr. Pope as an experienced union professional who mounted a campaign under the "false cry of democracy" to assume one-man control and personal domination of Local 268 at the expense of rank-and-file Local 268 members who were in no position to cope with "a man of his capacities." *Id.* at 187.

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[2] Labor organizations like the OPEIU may impose trusteeships over locals for several reasons, including those of "assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization." 29 U.S.C. § 462.

From the time the defendant imposed the trusteeship on Local 268, October 25, 1989, until defendant terminated Mr. Pope as business representative on February 8, 1990, Mr. Pope worked under the direction and control of Don Wright, the trustee. The defendant took the position that, pursuant to the OPEIU's constitution, Mr. Wright had to issue plaintiff a withdrawal card when plaintiff was terminated as business representative and thereby involuntarily remove him from union membership because he was no longer in the employ of the local. *See* Plaintiff's Exhibit 86, Article XXI, 1.b. at 46.

The defendant took the position that the primary reason Mr. Pope was terminated on February 8, 1990, was insubordination. Mr. Wright testified that when Mr. Pope refused to follow Wright's instructions regarding the local's policy on use of TVA's internal mail, it was the "final straw" and resulted in Pope's termination.

The defendant denied that it ever attempted to dissuade Pope from running for president of the local by offering to lift the trusteeship; denied that the hearing conducted on December 5, 1989, to determine whether to continue the trusteeship was a sham; denied that plaintiff had been damaged; denied that it ever acted in a willful, wanton, or malicious manner or in bad faith; and denied that plaintiff was due any relief whatsoever.

C. Stipulated Facts

Elections for officers of Local 268 were held in April, 1991, and Jo F. Davenport was elected president of the Local. On April 30, 1991, the trusteeship was vacated and complete selfgovernance was restored to Local 268 and it now functions under its local constitution and by-laws. Plaintiff was rehired by the newly elected officers of Local 268 as the Local's business representative on May 1, 1991, and continues to work in that capacity.

II.

The defendant raises the following matters in support of its motion for judgment as a matter of law[3] or for a new trial.

- "The overwhelming, dominant event in this case requires and necessitates a close judicial scrutiny of the record."

- Judgment as a matter of law should be granted.

- The undersigned erred by allowing the jury to determine the validity of the trusteeship by allowing it to make bad faith findings, which would have made the trusteeship invalid under law.

- The undersigned erred by granting plaintiff judgment as a matter of law in connection with the 29 U.S.C. § 101(a)(5) claim.

- The undersigned erred in admitting the Department of Labor documents into evidence.

- The undersigned erred by failing to give all of the jury instructions proposed by defendant.

- The undersigned erred in allowing the jury to award damages for emotional distress contrary to the evidence.

- The undersigned committed numerous other errors.

- The punitive damages award must be vacated.

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[3] Defendant described its motion as one for "judgment n.o.v.". The 1991 amendments to Rule 50, Fed. R. Civ. P., abandoned the "directed verdict" and "judgment not withstanding verdict" terminology in favor of "judgment as a matter of law" for both pre-verdict and post-verdict motions of this type.

I will deal with each contention in order.

A. – "The overwhelming, dominant event in this case requires and necessitates a close judicial scrutiny of the record."

The defendant contends that the emotion demonstrated by Mr. Pope during his direct examination was a "well orchestrated climax to his testimony [with] copious tears and convulsive sobbing." The defendant contends that the case was lost for defendant at that point because the jury could not put aside sentiment and its sympathy for the plaintiff.[4] The defendant also argues that the jury listened to the case with "stone faces" and "closed minds . . . without understanding a word of it." I take this to mean that defendant is seeking a new trial on the ground that the jury's verdict was the product of sentiment and sympathy.

One of the elements of plaintiff's claim for damages was mental anguish and emotional distress proximately caused by defendant's conduct. *See Rodonich v. House Wreckers Union Local* 95, 817 F.2d 967, 977-978 (2d Cir. 1987); *Guidry v. International Union of Operating Eng. Loc. 406*, 882 F.2d 929, 943-944 (5th Cir. 1989), *vacated on other grounds*, 110 S.Ct. 1465, *on remand* 907 F.2d 1491 (5th Cir.), *cert. denied*. 111 S.Ct. 591 (1990). Mr. Pope became upset when asked why loss of his job as business representative on February 8, 1990, had caused him to be distressed. He explained that one of the primary reasons he took the job with OPEIU was to cut down on the amount of traveling he had to do. In his previous jobs with other unions he had traveled a lot and he said that it had resulted in the breakup of his first marriage and had interfered with his relationship with his two

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[4] The defendant did not ask for a mistrial at that point.

sons. He said he had remarried and had two young daughters when he was terminated by defendant on February 8, 1990. He said that the prospect of having to go back on the road working for another union upset him greatly in light of his earlier experience. In fact, he was able to secure a temporary job with a textile union in April, 1990 and was sent to Georgia to organize for it. He said he was away from home five days per week while that job lasted.

I asked the jury during *voir dire* if they could decide the case on the facts and the law and put aside sympathy for any party. None of the jurors indicated that he or she could not do so. The charge instructed that the jury could not be governed by sympathy, prejudice or public opinion.

At side bar, counsel discussed with me whether or not Mr. Pope could go into certain testimony about one of his sons. The defendant opposed admitting the evidence and I sustained the objection.

The evidence which was being presented was relevant to Mr. Pope's claim for damages. Whether the evidence was "orchestrated" was for the jury to decide. If the defendant believed the case was "over" at that point, it should have moved for a mistrial or other relief. This would have given the undersigned an opportunity to consider what measures, if any, might have been taken at the time. Defendant's comment about the jury not understanding a word of defendant's case is a matter of speculation. In his responsive brief, the plaintiff, through counsel, describes the jury's verdict as "tempered" and demonstrating, from plaintiff's perspective, that the jury heard and understood the defendant's case. In any event, the defendant offers no facts to support its contention that the jury was confused or otherwise did not understand defendant's case.

A new trial will not be granted on the ground that the jury's verdict was the product of sentiment and sympathy.

B. Judgment as a Matter of Law, Rule 50(b), Federal Rules of Civil Procedure.

The issue raised by a motion for judgment as a matter of law (formerly known as a motion for judgment notwithstanding the verdict or for judgment n.o.v.)

> . . . is whether there is sufficient evidence to raise a question of fact for the jury. . . . This determination is one of law to be made by the trial court in the first instance. . . . In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in his favor. . . . If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to different conclusion, then the motion should be granted.

Morelock v. NCR Corp., 586 F.2d 1096, 1104-1105 (6th Cir. 1978), *cert. denied*, 99 S.Ct.1995 (1979). There is little doubt that reasonable minds could differ in regard to the evidence presented during the trial of this case. All of the questions presented to the jury raised questions of fact for their determination. Therefore, the defendant's renewed motion for judgment as a matter of law will be denied. The jury answered the questions put to it as follows:

VERDICT FORM I

1. Was the plaintiff involuntarily removed from union membership in retaliation for the exercise of his right guaranteed by 29 U.S.C. § 411(a)(1) to participate equally with the other union members in union affairs and elections?

X	
Yes	No

2. Was the plaintiff involuntarily removed from union membership in retaliation for the exercise of his free speech and assembly rights guaranteed by 29 U.S.C. § 411(a)(2)?

X	
Yes	No

3. Did the plaintiff prove by clear and convincing evidence that the trusteeship was *imposed* for the purpose of interfering with the plaintiff's free speech and assembly rights, or his right, with other union members, to participate equally in union affairs and elections?

	X
Yes	No

4. Did the plaintiff prove by clear and convincing evidence that the trusteeship was *maintained* for the purpose of interfering with the plaintiff's free speech and assembly rights, or his right, with other members, to participate equally in union affairs and elections?

X	
Yes	No

5. Did the plaintiff prove by clear and convincing evidence that his termination as a union employee was part of a scheme by the defendant to suppress the rights of free speech and assembly and the right to participate equally in union elections and affairs within the union?

Yes	No
X	

6. [Answer this Question only if you answered "yes" to Question 1, 2, 3, 4 *or* 5]

Did the plaintiff suffer any damages as a proximate result of the defendant's conduct as specified above?

Yes	No
X	

7. [Answer this Question only if you answered "yes" to Question No. 6]
We fix plaintiff's compensatory damages connection with the matters set forth in the previous questions at $100,000.00.

8. The Court has ruled that Mr. Pope's due process rights under 29 U.S.C. § 411(a)(5) to have written charges, time to prepare his defense and a full and fair hearing before he could be removed involuntarily from union membership were violated. Do you find that he was damaged as a proximate result of such violation?

Yes	No
X	

9. If you answered "yes" to Question No. 8, what is the amount of plaintiff's due process damages? $1.00.

10. [Answer this Question only if you found in Question Nos. 7 or 9 or both that plaintiff is entitled to compensatory or nominal damages]

Is this an appropriate case for punitive damages?

X	
Yes	No

VERDICT FORM II

1. We fix plaintiff's punitive damages at $100,000.00.

The defendant argues that the central issue in this case was whether the plaintiff's discharge on February 8, 1990, was part of a plan or scheme by defendant to suppress rights of speech and assembly of members of Local 268. Defendant contends that the plaintiff had the burden of showing by clear and convincing evidence that the defendant acted in accordance with such scheme or plan.

Assuming, for the moment, that the central in this case [sic] was whether or not Mr. Pope's discharge was part or a plan or scheme by defendant to suppress rights of speech and assembly of members of Local 268, the undersigned is of the opinion that sufficient evidence was adduced at trial such that a reasonable jury might conclude that there was clear and convincing evidence to support such a claim.

The plaintiff claimed in this case that he was terminated from his position as a business agent for Local 268 in retaliation for exercising, and in an effort to suppress and interfere with, his right to free speech and his equal right to participate in union affairs and elections. 29 U.S.C. § 411 was

meant to protect the rights of union members as members and not an individual member's right to employment with the union. Thus, the jury was charged that Mr. Wright, as the trustee of Local 268, could terminate Mr. Pope as business representative for Local 268 for any reason or for no reason at all unless that termination violated federal law.

The jury was also charged that a union employee, such as Mr. Pope, may become a symbol for a movement within the rank and file of union members and the discipline/termination of that person could be considered threatening to the exercise of Title I rights of not only the union employee individual, but Title I rights of the union members generally. *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d 41, 45 (2nd Cir. 1989); *Cotter v. Owens*, 753 F.2d 223, 229 (2nd Cir. 1985). In order to recover under this claim as a union *employee*, the plaintiff had the burden of proving by clear and convincing evidence that his termination was not based upon any legitimate work-related reasons; and that, instead, his termination was part of scheme to suppress dissent within the union. *Finnegan v. Leu,* 456 U. S. 431, 102 S.Ct. 1867 (1982); *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d at 45. In other words, the question before the jury was whether or not the action taken against Mr. Pope in discharging him was part of a purposeful and deliberate attempt to suppress dissent within the union. *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d at 45. The jury was so instructed and the jury was instructed on the meaning of clear and convincing evidence. *See Cruzan v. Director Missouri Dept. of Health*, 110 S.Ct. 2841, 2855 n. 11 (1990).

I will not attempt to highlight all of the evidence which supported the jury's verdict. Some of that evidence is as follows: At this point in time the undersigned must view the

evidence in the light most favorable to the plaintiff drawing from that evidence all reasonable inferences in the plaintiff's favor. *Morelock v. NCR Corp.*, 586 F.2d at 1104-1105.

Several weeks into the trusteeship which began on or about October 25, 1989, Mr. Wright stated in his first trusteeship report to Mr. Kelly that the "problems in the Local are politically motivated. One faction of the Executive Board supported Phillip Pope in his efforts to run the business of Local without the orders of the Board. He is a Local 268 member and is planning to run for Local President. Local elections are scheduled to be held in December of 1989." Plaintiff's Exhibit 119. On December 5, 1989, just before the hearing before Hearing Officer Sheridan, Mr. Pope was issued a written reprimand by the trustee that the jury could have viewed as a reprimand for actions that were protected activities under Section 411(a)(2) and the jury could have viewed it as an effort to discourage the plaintiff from testifying before Hearing Officer Sheridan. Plaintiff's Exhibit 7. There was evidence from which the jury could have concluded that the hearing before Mr. Sheridan was not conducted in a balanced manner. It is notable that Mr. Sheridan sent a draft of his report that was to go to the international union to Trustee Wright and to International representative Faye Orr without sending a copy to anyone in the "Pope faction." Mr. Sheridan sent a draft of the report of the hearing to Mr. Wright with a cover letter stating "need your comments and feel free to add/delete–please." Plaintiff's Exhibit 33. No one in the "Pope faction" was given any similar opportunity to comment or add or delete to the report that ultimately went to the international supporting the imposition of the trusteeship. It was no secret that Pope and his followers vehemently opposed the imposition and continuation of the trusteeship.

In a trusteeship report dated February 10, 1990, which went to President Kelly and the international union, Mr. Wright advised President Kelly that he was going to interview a person for the job of business agent of Local 268 (Pope had been fired on February 8) and Wright said that "[i]f it goes well, I will make him an offer with a one year contract to influence Pope to move on ." Plaintiff's Exhibit 119.

As indicated above, President Kelly came to the conclusion that Mr. Pope wanted to be "the leader, the king, the dictator [of Local 268], that was the issue." Deposition of John Kelly taken February 26, 1991, at 190. The International Union came to view Mr. Pope as an experienced union professional who mounted a campaign under the "false cry of democracy"to assume one-man control and personal domination of Local 268 at the expense of rank-and-file Local 268 members who were in no position to cope with "a man of his capacities." *Id.* at 187. It was for the jury to decide whether or not Mr. Pope's activities were part of the normal democratic process which, of course, can be "messy" and unorganized at times, or whether his activities had the effect of undermining democratic procedures in Local 268 and thereby justifying the continuation of the trusteeship. It should be noted that the jury found in favor of the defendant on the question of whether or not the trusteeship was imposed for the purpose of interfering with the plaintiff's free speech and assembly rights or his right with other union members to participate equally in union affairs and elections.

One of the most damaging pieces of evidence as far as the defendant was concerned is contained in the February 10, 1990, trustee report in which Mr. Wright recommended to President Kelly that "we not hold nominations [for Local 268 offices] immediately, but wait a month or so to let things calm down some while the slate of 'non-Pope' candidates are [sic]

gaining followers." Plaintiff's Exhibit 119. There was also evidence from which the jury could have concluded that the International used trusteeship and union funds in an attempt to influence the elections which were eventually held. Plaintiff's Exhibit 142. In a letter to members, Faye Orr stated that "Phillip Pope who is not a member in good standing in Local 268, is not eligible to be a candidate in the coming election, but he is still trying to deceive and divide and cause many of the problems that led to the trusteeship in the first place." Plaintiff's Exhibit 142. In fact, Mr. Pope was eligible to be a candidate in the elections held in April of 1991 since he was actively contesting the defendant's determination that he was ineligible to run for office. *Brennan v. Independent Lift Truck*, 490 F.2d 213, 217 (7th Cir. 1974); *Marshall v. APWU*, 105 LRRM 3384 (D.D.C. 1980). *See* Plaintiff's Exhibit 200. Nonetheless, the International prevented him from appearing on the slate which was ultimately elected in the spring of 1991.

There was also evidence from which the jury could have concluded that the defendant tried orchestrate a merger of Local 268 with Local 119 in Chattanooga "since it would eliminate the possibility of Pope's reinstatement." Plaintiff's Exhibit 119, Trustee Report of April 29, 1990.

There was also evidence from which a reasonable jury could have concluded that the defendant used the trusteeship to threaten the Pope supporters and cause them not to use the TVA mail to communicate with each other if the communication favored the plaintiff or the dissolution of the trusteeship, but that the defendant allowed its own supporters of the trusteeship to use the TVA mail for pro-trusteeship messages. *See*, *e.g.*, Defendant's Exhibit 50. There was evidence that Ms. Orr and International vice-president Tom Babb also used the TVA mails for union business. *See* Plaintiff's Exhibit 211.

The defendant was notified in October, 1990 that the Department of Labor had conducted an investigation concerning the trusteeship imposed over Local 268. The defendant was told that there may have been a procedural flaw in imposing the trusteeship but aside from that the trusteeship might have been invalid for another reason.

> The International Union has failed to demonstrate to OLMS [Office of Labor Management Standards] that the trusteeship was imposed for a reason which is valid under the statute. Our investigation did not determine that the Local had been guilty of failing to follow democratic procedures in any matter contemplated by Title III. The other cited reason for imposition, to correct instability and factionalism, is not a valid purpose under section 302 of the LMRDA.
>
> It is the conclusion of this Office that, even though the trusteeship imposed over Local 268 is still within its initial 18-month period, there is doubt as to whether the imposition was procedurally correct. If not correctly imposed, no presumption of validity attaches to this trusteeship. Even if the trusteeship imposition is presumed to be procedurally valid, there appears to be clear and convincing evidence that it was imposed and is being continued for purposes other than those allowable under section 302.[5]

Plaintiff's Exhibit 197.

The defendant was given the opportunity to reply to these allegations and through its general counsel, Joseph E. Finley

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[5] Section 302 of the LMRDA is codified at 29 U.S.C. § 462 and sets out the purposes for establishment of a trusteeship.

(also trial counsel for the defendant), the defendant replied on October 8 and 22 in writing. On November 21, 1990, the Department of Labor wrote to John Kelly, the defendant's president stating:

> Mr. Finley's arguments not withstanding, a troublesome situation still remains. Most of the individuals within Local 268 who are prominently involved in the socalled "schisms" are no longer active or even members of Local 268. Even if the trusteeship were voluntary (although it is not, by strict constitutional definition), no trusteeship can continue indefinitely simply because all of the members of the subordinate are not of a like mind; a virtual impossibility in a democratic organization. Without conceding that the imposition of the trusteeship was ever valid, the Department's position is that its continuation at this time is certainly for no legitimate purpose. In fact, the continuation serves to deprive the membership of Local 268 of the officer election to which it was entitled in December 1989.
>
> A final decision concerning action by the Department of Labor to require the termination of the trusteeship over Local 268 has not been made. Please advise me of the OPEIU's purpose in continuing the trusteeship at this time.

The Department of Labor never stepped in to end the trusteeship because that became moot. In December, 1990, Mr. Kelly proposed termination of the trusteeship after elections for officers of Local 268 were held. These were ultimately held in April of 1991.

In February of 1991, the Department of Labor advised Mr. Kelly in a letter that Mr. Pope's discharge did not

necessarily make him ineligible for union office in that election. Plaintiff's Exhibit 200. Nonetheless, the defendant would not allow him to appear as a candidate on the slate.

As indicated earlier, I must view the evidence in a light most favorable to the plaintiff at this time in deciding whether or not the defendant is entitled to judgment as a matter of law. Having done so, I conclude that there was evidence from which a reasonable jury could have found by clear and convincing evidence that Mr. Pope's termination as a union employee was part of scheme by the defendant to suppress the rights of free speech and assembly and his right to participate equally in union elections and affairs within the union.

The jury was instructed that it is lawful for an international union to impose and continue a trusteeship on a local union for the broad purpose of assuring order within their organization and preserving the integrity and stability of the organization itself. *Teamsters Local Union No. 402 v. Crane*, 848 F.2d 709, 713 (6th Cir. 1988). Certain specific justifications for the imposition and continuation of a trusteeship are set forth in 29 U.S.C. § 462. The reason Congress enacted a statutory provision governing imposition of trusteeships over a local union by an international or parent union and requiring that trusteeships be established and administered only in accordance with the constitution and bylaws of the organization which has assumed trusteeship was to prevent arbitrary imposition of trusteeships on locals or imposition of trusteeships for wrongful purposes. *Jolly v. Gorman*, 428 F.2d 960 (5th Cir. 1970), *cert. denied*, 91 S.Ct. 588 (1971).

The jury was also instructed that free speech and assembly rights and the rights to participate in union affairs and elections do not fall by the wayside whenever a trusteeship is imposesd. *Sheetmetal Workers International*

Union v. Lynn, 109 S.Ct. 639 (1989). These rights are fully compatible with the existence of trusteeship. *Farrell v. International Brotherhood of Teamsters*, 888 F.2d 459, 462 (6th Cir. 1989). If a trusteeship is legally and properly imposed and maintained, the trustee has no duty to hold local union elections. *Farrell v. International Brotherhood of Teamsters*, 888 F.2d at 462.

The jury was told that it was not being asked to judge the validity of the trusteeship and that the evidence concerning the imposition and continuation of the trusteeship was to be considered by the jury solely in connection with determining whether the proffered justification by the defendant for imposing a trusteeship in this case was plausible or whether the defendant actually imposed or continued the trusteeship for the purpose of chilling the plaintiff's free speech and assembly rights and/or his equal right to participate in union affairs and elections. The jury was also charged that the defendant was entitled to deference with regard to its decision to impose the trusteeship absent a showing that its decision to do so was made in bad faith or for an improper purpose. *Teamsters Local Union 406 v. Crane*, 848 F. 2d at 713. The jury was also charged that in order to establish liability on the plaintiff's claim that the defendant imposed or continued a trusteeship on Local 268 in retaliation for, or to suppress his free speech and assembly rights, or his right to participate equally in union affairs and elections, the plaintiff had to prove by clear and convincing evidence that the reasons proffered by the defendant for imposing and continuing the trusteeship were pretextual and that the defendant imposed and continued the trusteeship in bad faith. 848 F.2d at 713; *Pruitt v. United Brotherhood of Carpenters and Joiners of America*, 673 F.Supp. 441, 445 (N.D. GA 1987), *aff'd* 893 F.2d 1216 (11th Cir.1990).

During the course of the trial, at various times, the defendant, through counsel, characterized Mr. Pope as a "hired hand" since he was appointed business agent of Local 268. This characterization fails to take into account, however, that he was a bona fide member of the defendant union at all times material to this suit up to his termination on February 8, 1990. With that membership came certain rights. Title I rights as guaranteed by 29 U.S.C. § 411 do not vanish with the imposition of a trusteeship. *Sheetmetal Workers International Ass'n v. Lynn*, 109 S.Ct. 639, 646 (1989). The jury was instructed that in order to establish liability on the plaintiff's claim that his involuntary removal from union membership was in retaliation for his exercise of free speech and assembly rights, plaintiff had to prove by a preponderance of the evidence that (1) his conduct was an exercise of plaintiff's rights under section 411(a)(2), (2) that the defendant involuntarily removed the plaintiff from union membership in substantial part because of this exercise of these rights under the LMRDA and (3) that he was damaged and suffered as a proximate result of the action of the defendant. *Black v. Ryder/P.I.E.. Nationwide Inc.*, 970 F.2d 1461, 1469 (6th Cir. 1992). The jury was also instructed that in order to establish liability on his claim that the defendant involuntarily removed him from the Union in order to deny him the right to equal participation in the Union democratic process, or to deny the local members the right to nominate and elect Mr. Pope the union office, the plaintiff had to prove by a preponderance of the evidence that he was involuntarily removed by the defendant in substantial part because of his political activities in seeking to be nominated and elected to an office in Local 268 and that he was damaged and suffered an injury as a proximate result of the actions of the defendant.

In summary, viewing the evidence in a light most favorable to the plaintiff, a jury reasonably could have returned the verdict as set out above in connection with all of

the plaintiff's claims. The defendant's motion for judgment as a matter of law will be denied.

C. – Alleged error in allowing the jury to determine the validity of the trusteeship by allowing it to make bad faith findings, which would have made the trusteeship invalid under law.

The jury was specifically instructed that it was not being asked to judge the validity of the trusteeship in this case. The jury was instructed that the purposes recognized by statute as justification for an international union's imposition and continuation of a trusteeship on one of its locals were to be considered by the jury solely in connection with determining whether the proffered justification by the defendant for imposing a trusteeship in this case was plausible or whether the defendant actually imposed or continued the trusteeship for the purpose of chilling the plaintiff's free speech and assembly rights or his equal right to participate in union affairs and elections. Normally, trusteeships are presumed valid unless they were established in bad faith or for unallowable reasons. *Teamsters Local Union No.406 v. Crane*, 848 F.2d at 713. Title I rights do not fall by the wayside whenever a trusteeship is imposed. *Sheetmetal Workers International Ass'n v. Lynn*, 109 S.Ct. at 645. A trustee's authority under Title III of the LMRDA ordinarily should be construed in the manner consistent with the protections provided by Title I. 109 S.Ct. at 646.

For these reasons, the question of whether the plaintiff could prove by clear and convincing evidence that the trusteeship was imposed or maintained for the purpose of interfering with plaintiff's Title I rights was submitted to the jury.

D. Alleged error in granting the plaintiff judgment as a matter of law in connection with the claim under 29 U.S.C. § 101(a)(5).

This section provides as follows:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense, and (C) afforded a full and fair hearing.

29 U.S.C. § 411(a)(5).

The plaintiff's motion for judgment as a matter of law made at the close of all the proof was granted. Rule 50(a), Fed. R. Civ. P. The undersigned is of the opinion that reasonable minds could not differ that when plaintiff was issued his withdrawal card from the Union shortly after he was terminated, the International Constitution at Article 21, section 1, provided that such cards were to be issued only to members of the Union. Plaintiff's Exhibit 86 at 46. Furthermore, the proof was uncontradicted that Mr. Pope joined the union of his own free will. The case of *NLRB v. Michigan Conference of Teamsters*, No. 92-6458, Sixth Circuit, decided and filed December 7, 1993, has no application to this case because Mr. Pope joined this union voluntarily and not involuntarily as a condition of his employment.

Reasonable minds simply could not differ that plaintiff was a member in good standing of Local 268 when he was terminated from his business representative job on February 8, 1990. The case of *Duncan v. Peninsula Shipbuilders Assoc.*, 394 F.2d 237 (4th Cir. 1968) involved a plaintiff whose discharge

from employment at a shipyard automatically terminated his union membership. The plaintiff in *Duncan* claimed that the defendant union conspired with the employer to have the plaintiff fired. The Court held that this stated a claim against the union under Section 411(a)(5).

In the present case, the defendant has maintained all along that Mr. Pope was not expelled from the Union but rather lost his membership in the union by operation of Article 21, § l (b) because once terminated, he no longer was in the employee of any employer who bargained with the local or the international (*i.e.*, TVA, Department of Energy and East Tennessee Baptist Hospital).

The instant case is much like the *Duncan* case because the defendant contends that loss of employment by Mr. Pope automatically terminated his membership rights in the union. Mr. Wright testified that Mr. Pope was no longer a member of the union once the withdrawal card was issued. The union simply cannot use discharge from employment as a grounds for denying the plaintiff his "due process" rights under section 411(a)(5). *Duncan v. Peninsula Shipbuilders Ass'n*, 394 F.2d at 239. *Duncan* was cited with approval in *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d at 48.

For the reasons indicated, Mr. Pope was due the procedural protections of section 411(a)(5) prior to his involuntary removal from union membership. This is true as a matter of law based upon the facts established at trial about which there can be no genuine issue concerning those facts. The proof is uncontradicted that the plaintiff was not given the protections provided by section 411(a)(5), *i.e.*, service with written charges, time to prepare his defense, and a full and fair hearing, prior to his involuntary withdrawal from union

membership. Thus, plaintiff's motion for judgment as a matter of law on the section 411(a)(5) claim was granted.

E. Alleged Error in Admitting Department of Labor into Evidence.

These documents are plaintiff's Exhibits 197, 198, 199, and 200. These reports were admitted into evidence pursuant to Rule 803(8)(C), Fed. R. Evid. That rule provides that in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness are admissible and not excluded by the hearsay rule even though the declarant is available as a witness.

There is a presumption in favor of admissibility of such reports and the party opposing admission of the report must prove that the report is not trustworthy. *Bank of Lexington v. Vining-Sparks Securities*, 959 F.2d 606, 616 (6th Cir. 1992). Such reports are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on factual investigation and satisfies the rule's trustworthiness requirement, it should be admissible. *Beech Aircraft Corp. v. Rainey*, 109 S.Ct. 439, 450 (1988). It is not necessary that the agency conducting the investigation hold a hearing or receive sworn testimony in order for such reports to be admissible in evidence. *Bank of Lexington*, 959 F.2d at 617. Furthermore, I find no requirement in Rule 803(8)(C) that the agency reports resulting from an investigation made pursuant to authority granted by law be final decisions of the agency in order for them to be admissible under 803(8)(C).

The final decision at issue here was whether or not the Department of Labor was going to sue the International Union

for the purpose of having the trusteeship vacated. That decision was never reached because the International Union decided around December, 1990, that it would allow the Local to hold elections and that the trusteeship would be lifted. The actual findings that are important here, *i.e.*, that the continuation of the trusteeship served to deprive the membership of Local 268 of the officer election to which it was entitled in December, 1989 and that the trusteeship was imposed and was being continued for purposes other than those allowable under 29 U.S.C. § 462, resulted from an extensive investigation conducted by the Department of Labor. Plaintiff's Exhibit 187 for identification only is a Freedom of Information Act response obtained by Mr. Pope and is the written report of investigation. This exhibit is comprised of some 687 pages. Even though the report was not admitted into evidence, the undersigned could consider it since the admissibility of the Department of Labor reports was a preliminary question and the undersigned is not bound by the Rules of Evidence except those with respect to privileges. Rule 104, Fed. R. Evid.

This lengthy report evidences rather careful consideration of the issue presented to the Department of Labor, *i.e.*, whether the trusteeship was properly imposed and whether it was properly maintained. Furthermore, Joseph E. Finley, Esq., general counsel for the defendant Union, responded to the Department of Labor's letter of September 27, 1990, with a memorandum dated October 8, 1990. Mr. Finley also sent the Department of Labor a supplemental memorandum dated October 22, 1990. Defendant's Exhibits 86, 87 and 88. In those memoranda, Mr. Finley vigorously defended the defendant's position. In the Department of Labor letter dated November 21, 1990, Richard G. Hunsucker, Director, Office of Elections, Trusteeships and International Union Audits of the Department of Labor acknowledged that Mr. Finley had

made several strong arguments in attempting to justify the trusteeship's imposition. He went on to say that not withstanding these arguments a "troublesome situation still remains." His letter goes on to state:

> Most of the individuals within Local 268 who were prominently involved in the so-called "schism" are no longer active or even members of Local 268. Even if the trusteeship were voluntary (although it is not, by strict constitutional definition), no trusteeship can continue indefinitely simply because all the members of the subordinate body are not of a like mind; a virtual impossibility in a democratic organization. Without conceding that the imposition of the trusteeship was ever valid, the Department's position is that it's continuation at this time is certainly for no legitimate purpose. In fact, the continuation serves to deprive the membership of Local 268 of the officer election to which it was entitled in December, 1989.

Plaintiff's Exhibit 198.

Under all the circumstances, the Department of Labor documents (plaintiff's exhibits 197, 198, 199 and 200) were properly admitted under Rule 803(8)(C).

F. Alleged Error in Failing to Give All the Jury Instructions Proposed by the Defendant.

The defendant does not cite to any specific instruction which the undersigned refused to give. The parties were given a draft of the instructions early during the trial of the lawsuit. Amendments and supplementations were made during the course of the trial and counsel had in their hands well in advance of the charge conference a final draft of what the undersigned intended to charge. A thorough charge conference was conducted and

counsel were advised precisely what the undersigned would charge before arguments were made.

Since the defendant has not seen fit to identify which of its instructions the undersigned should have given but did not, I will not attempt to guess at the matter. Most of the instructions submitted by the defendant were charged or at least charged in substance.

G. Alleged Error in Allowing the Jury to Award Damages for Emotional Distress Contrary to the Evidence.

Over the plaintiff's objection, the jury was charged that in order to recover on the plaintiff's claim for emotional distress, mental anguish, and loss of reputation the plaintiff had to produce evidence of some physical manifestation of emotional distress. *See Petramale v. Local No. 17 of Laborers International*, 847 F.2d 1009, 1012 (2nd Cir. 1988); *Rodonich v. House Wreckers Union Local 95*, 817 F.2d 967, 977-978 (2nd Cir. 1987); *Bloom v. International Brotherhood of Teamsters*, 752 F. 2d 1312, 1315 (9th Cir. 1984).

The plaintiff and his wife testified about the effects of his termination on him physically. In the trusteeship report dated January 21, 1990, Mr. Wright noted that Mr. Pope was complaining of health problems due to the stress of this situation and that Mr. Pope had been to the doctor twice. He said that he had taken a stress test which was negative with no evident heart problem, but that he took the week of January 22, 1990 through January 26, 1990, off as sick leave on the doctor's orders. Wright also said that he had requested a doctor's letter to be put in Mr. Pope's file. Plaintiff's Exhibit 119.

Mr. Pope also testified regarding the emotional trauma he suffered when he was terminated. This was the subject of the

defendant's first assignment of error in this motion. Obviously, Mr. Pope became very emotional on the witness stand.

His wife testified that he had seen a doctor in January of 1990 for chest pains; that he was under a lot of stress; that he was on "pins and needles" and not sleeping well; she said that when he was fired he became depressed and sad; that his reputation was damaged in the union committee because he had been labeled as a "dissident"; and that she felt that he had put on weight as a result of his depression.

Viewing the evidence in a light most favorable to the plaintiff, a reasonable jury could have returned an award of damages for emotional distress proximately caused by the conduct of the defendant.

H. Alleged "Numerous Other Errors".

The defendant does not specify what these alleged errors were and so the undersigned cannot respond.

I. Punitive Damages.

The defendant contends that the Court's instructions on punitive damages were clearly and totally ignored and that the punitive damages award must be set aside. I will not repeat the information set out above that was contained in the trustee reports nor the evidence resulting from the Department of Labor investigation. The undersigned has previously found that there was sufficient evidence from which a reasonable jury could have concluded that the plaintiff proved by clear and convincing evidence that this trusteeship was maintained in violation of plaintiff's rights under Section 411(a)(1) and (2) and that there was sufficient evidence from which a reasonable jury could find by clear and convincing evidence that the plaintiff's termination as a union employee was part of a

scheme by the defendant to suppress the rights of free speech and assembly and the rights to participate equally in union elections and affairs within the union. The information received by the union from the Department of Labor was relevant regarding the defendant's state of mind because one of the issues here was the continued maintenance of the trusteeship after it had been imposed. It was months after the defendant became aware of the Department of Labor investigation that the defendant finally decided to allow elections and it was several months after that before elections were actually held. The defendant intentionally prohibited Mr. Pope from running for the presidency in March of 1991 even after the Department of Labor had told the defendant that under existing legal precedent, he was eligible to run. Plaintiff's Exhibit 200.

The defendant does not complain that the jury was charged improperly regarding the question of punitive damages; rather, the defendant complains that the issue was presented to the jury and now complains of the result reached. Viewing the evidence in the light most favorable to the plaintiff, as I must at this point, there was evidence upon which a reasonable jury could have found by a preponderance of the evidence that the defendant acted maliciously, recklessly, or with willful or wanton indifference to the plaintiff's rights. *See Cooke v. Orange Belt District Council of Painters*, 529 F.2d 815, 820 (9th Cir. 1976); *Quinn v. DiGiulian*, 739 F.2d 637, 648 (D.C. Cir. 1984). The jury could have concluded from the evidence that the defendant's dislike for Mr. Pope resulted in a very personal attack on him and eventually resulted in his termination with hopes that he would "move on." The hostility between plaintiff and Faye Orr, an international representative of defendant, was evident almost from the first time they met. The jury could have concluded from the events at trial that the defendant's hostility toward Mr. Pope continues.

III.

For the reasons indicated, the defendant's motion for judgment as a matter of law, for a new trial, and to set aside the punitive damages award will be denied.

Order accordingly,

FILE:

/s/ Robert P. Murrian

Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 684-2953

Filed: April 17, 1996

Joseph E. Finley
4201 Underwood Road
Baltimore, MD 21218

Re: 94-5399
Thompson vs. Office & Prof
District Court No. 90-00669

Dear Mr. Finley:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
Leonard Green, Clerk

/s/ Peggy Eshman
(Mrs.) Peggy Eshman
Administrative Assistant

Enclosure
cc: Mr. Arthur L. Fox II

No. 94-5399

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

P.J. THOMPSON, ET AL.,

Plaintiffs,

PHILLIP R. POPE,

Plaintiff-Appellee,

v.

OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Defendant-Appellant.

ORDER

BEFORE: JONES and RYAN, Circuit Judges; and MATIA, * District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and the decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

---

* Hon. Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 28, 1996

Mr. Joseph E. Finley
4201 Underwood Road
Baltimore, MD 21218

Re: Office and Professional Employees International Union, AFL-CIO, CLC v. Phillip Pope
Application No. A-1062

Dear Mr. Finley:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on June 28, 1996, extended the time to and including September 14, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Loretta S. Ruffin
Loretts S. Ruffin
Assistant Clerk

(2)

Supreme Court, U.S.
FILED
OCT 16 1996
CLERK

No. 96-418

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Petitioner,

v.

PHILLIP R. POPE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In 1988, Phillip Pope was hired as the business representative of Knoxville, Tennessee Local 268 of the Office and Professional Employees International Union, AFL-CIO (hereinafter, OPEIU). Previously, he had worked for twenty-eight years in the labor movement in a variety of positions. Although the description for his new job said that "[t]he Business Representative should be a dues-paying member of OPEIU Local 268," membership was not a condition of employment. Nonetheless, Pope, who had always previously been a union member and affirmatively wished to belong to Local 268, voluntarily joined the Local immediately after assuming his new position. JA 142-43, 782-83.[1]

Pope soon learned that the Local had been losing members and experiencing financial difficulties, problems which had not been addressed by the elected leadership. In fact, he discovered that the elected officials had engaged in a variety of conduct in violation of the Union's governing instruments and federal law. App. 3a-4a. When he brought this information to the attention of top OPEIU officials in an effort to secure reforms, they declined to take action against the Local's officers on the ground that OPEIU never, supposedly, "got involved in local politics." But, when Pope shared the information with the Local's members, their dissatisfaction with their incumbent leaders grew, as did his own reputation among the members, many of whom were already demoralized by massive layoffs by their employer, the Tennessee Valley Authority (hereinafter, "TVA").

In the summer of 1989, a Local reform slate of

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[1] "JA" citations are to the Joint Appendix filed with the Court of Appeals. "App." citations are to the lower courts' decisions which are reproduced in the Appendix to the Petition for Certiorari.

candidates was formed in anticipation of new officer elections in December of that year. Pope was selected to head the reform ticket which stood for "making our union responsive to the will of the members which meant probably kicking out most, if not all, of the old officers, bringing our constitution and bylaws up to date like should have been done, running our union the way it should be run, [and] being more responsive to the members problems [and] needs." App. 4a-5a. After word of this slate got out, Pope was confronted by OPEIU International Representative Faye Orr about his intention to run for elective office in Local 268. Although it was not at all unusual for appointed OPEIU business agents simultaneously to hold Local elective office, Orr informed Pope that "there is no way in hell OPEIU will tolerate [your running for office]." App. 5a.

Shortly thereafter, several members of the Local Executive Board sought unsuccessfully to convert Pope to "associate" membership status which would have rendered him ineligible to run for elected office. And then, at a membership meeting on October 16, 1989, one Board member sought to have Pope terminated. However, her motion failed for lack of support; instead, the membership overwhelmingly endorsed a proposal supporting Pope's candidacy for Local President. App. 5a-6a.

Immediately after this meeting, incumbent Executive Board members met with International Representative Orr who counselled them to request OPEIU to place the Local under trusteeship. JA 849-50, 1185-88. By letter dated October 18, 1989, to OPEIU President John Kelly, they requested "immediate intervention" and imposition of a "voluntary trusteeship" on Local 268. JA 1181. On October 25, 1989, Kelly obliged, imposing an "emergency" trusteeship without the benefit of an investigation or a hearing, and OPEIU assumed total control over the Local through an

appointed trustee, Donald Wright. App. 6a-7a. Wright temporarily retained Pope as an employee, but it soon became clear that his days with the Local were numbered.

Several weeks later, Pope asked Wright what it would take to have OPEIU lift its trusteeship. Wright responded: "if you would . . . tell the members that you are not going to run for president, I think we can get this trusteeship over in a hurry." App. 7a. On December 5, 1989, a hearing to determine the need to continue the trusteeship was conducted by OPEIU Vice President Sheridan. International Representative Orr and Trustee Wright presented OPEIU's case in favor of continuing the trusteeship; the Local membership submitted evidence in opposition. App. 9a. Orr testified that the trusteeship was necessary since Pope had failed to stay out of Local politics. JA 269. Prior to issuing his post-hearing report, Sheridan furnished copies of his draft to both Wright and Orr and urged them to feel free to edit it. App. 9a. It subsequently came as no surprise that Sheridan ruled in favor of the trusteeship. Meanwhile, Wright had instructed Pope that he was to give no aid or comfort to Local members who had been calling the trusteeship hearing process a "kangaroo court" and reprimanded Pope for having "continued to be a source of divisiveness within the membership of Local 268." App. 8a.

After the hearing, Wright told Pope that "it would be best for you to move on," "while you've got a chance," "I haven't expelled you yet." App. 9a. When Pope failed to heed this advice, Wright terminated him on February 8, 1990, due to "incompatibility with the Local." App. 9a.[2] Shortly

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[2] OPEIU claims that Pope was terminated for allegedly supporting a membership "legal defense fund" and for improper "use of TVA mail under the union contract. Cert Petn at 8. OPEIU made both arguments (continued...)

thereafter, despite the fact he continued to tender his membership dues, Pope was issued, involuntarily, a membership "withdrawal card," rendering him ineligible to run for office. App. 10a.

In his periodic reports to OPEIU President Kelly, Trustee Wright acknowledged that the "problems in the Local are politically motivated . . . [Pope] is a local 268 member and is planning to run for Local President." JA 1294-95. Immediately after terminating Pope, Wright told Kelly he would give Pope's replacement "a one year contract to influence Pope to move on." JA 1304-05. He went on to "recommend that we not hold nominations immediately, but wait a month or so to let things calm down some while the slate of 'non-Pope' candidates are gaining followers." *Id.*; App. 10a. OPEIU President Kelly testified that the reason he did not lift the trusteeship was because the Local was not yet prepared "to make an intelligent decision . . .. The members were not ready for an election." JA 775-76.

When a slate of "non-Pope" candidates failed to materialize, OPEIU attempted to merge Local 268 into a much larger OPEIU Local in Chattanooga since, in Trustee Wright's words, "it would eliminate the possibility of Pope's reinstatement." App. 10a; JA 1308. Wright subsequently informed Kelly that he had "met with TVA management to get their assistance in preventing Pope and his crew from distributing" literature in opposition to the merger. JA 1309.

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[2](...continued)
to the jury which rejected them. Moreover, the contract language regarding use of the internal TVA mail states: "Mail between TVA and the representatives of recognized unions and mail between representatives or members of recognized unions may be transmitted through TVA interoffice mail." JA 1433.

In November, 1990, after concluding a lengthy investigation of the Local 268 trusteeship, the U.S. Department of Labor informed OPEIU:

> Without conceding that the imposition of the trusteeship was ever valid, the Department's position is that it's (sic) continuation at this time is certainly for no legitimate purpose. In fact, the continuation serves to deprive the membership of Local 268 of the officer election to which it was entitled in December, 1989.

App. 69a. Early the following year, 1991, nearly eighteen months after imposing its trusteeship on Local 268, and just prior to a hearing scheduled on the plaintiff's motion for a preliminary injunction to set aside the trusteeship, OPEIU scheduled officer elections in the Local and eventually turned over the authority for governing the Local to the newly elected officials.[3] App. 47a.

Proceeding in District Court[4]

As the district court stated in its Opinion denying OPEIU's Rule 50, F. R. Civ. P., motion to set aside the judgment, in order for Pope to recover on his claim of unlawful termination as an appointed

> union *employee*, the plaintiff had the burden of proving by clear and convincing evidence that his termination was not based upon any legitimate work-

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[3] The count in plaintiffs' complaint seeking to have the trusteeship lifted was subsequently dismissed on mootness grounds.

[4] The action was filed with the United States District Court for the Eastern District of Tennessee, and tried before a jury pursuant to *Wooddell v. IBEW*, 502 U.S. 93 (1991).

> related reasons; and that, instead, his termination was part of a scheme to suppress dissent within the union. *Finnegan v. Leu*, 456 U.S. 431, 102 S. Ct. 1867 (1982); *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d at 45. In other words, the question before the jury was whether or not the action taken against Mr. Pope in discharging him was part of a purposeful and deliberate attempt to suppress dissent within the union. *Franza v. International Brotherhood of Teamsters Local 671*, 869 F.2d at 45. The jury was so instructed and the jury was instructed on the meaning of clear and convincing evidence. *See Cruzan v. Director Missouri Department of Health*, 110 S. Ct. 2841, 2855 n. 11 (1990).

App. 55a. Concerning the trusteeship, the district court explained:

> The jury was told that it was not being asked to judge the validity of the trusteeship and that the evidence concerning the imposition and continuation of the trusteeship was to be considered by the jury solely in connection with determining whether the proffered justification by the defendant for imposing a trusteeship in this case was plausible or whether the defendant actually imposed or continued the trusteeship for the purpose of chilling the plaintiff's free speech and assembly rights and/or his equal right to participate in union affairs and elections. The jury was also charged that the defendant was entitled to deference with regard to its decision to impose the trusteeship . . .. The jury was also charged that in order to establish liability on the plaintiff's claim that the defendant imposed or continued a trusteeship on Local 268 in retaliation for, or to suppress his free speech and assembly rights, or his right to participate

> equally in union affairs and elections, the plaintiff had to prove by clear and convincing evidence that the reasons proffered by the defendant for imposing and continuing the trusteeship were pretextual and that the defendant imposed and continued the trusteeship in bad faith.

App. 62a. *OPEIU did not challenge these instructions on appeal.*

The jury found that OPEIU maintained and utilized its trusteeship over Local 268 for the purpose of implementing a scheme to suppress a budding democratic movement in the Local, and specifically to infringe plaintiff's Title I right of free speech and his right to participate in local union affairs, including the officer elections. *See* 29 U.S.C. § 411(a)(1) and (2). Specifically, it found that Pope's termination was part of that scheme to suppress members' democratic rights; and it found that Pope was "involuntarily removed from union membership in retaliation for the exercise of his [Title I rights]" by virtue of his termination and concomitant issuance of a withdrawal card and awarded him $1 in damages to compensate him for OPEIU's having denied him the due process protections guaranteed by 29 U.S.C. § 411(a)(5). App. 52a-53a (Findings 1, 2, 8, 9).

When denying OPEIU's Rule 50 motion, the district court reviewed evidentiary highlights and concluded that there was sufficient evidence in the record from which a reasonable jury could have arrived at these findings by the "clear and convincing" standard. App. 54a-64a. On appeal, "OPEIU also challenge[d] the verdict as not supported by sufficient evidence." App. 25a. But, "using the same standard used by the district court," the court of appeals "conclude[d] that the jury verdict was supported by sufficient evidence." App. 25a-26a.

OPEIU's Arguments Below

Among the many arguments presented by OPEIU to the court of appeals was its claim that Pope was not a "true rank and file union member" who was entitled to enjoy the protections of the Labor-Management Reporting and Disclosure Act (hereinafter, "LMRDA"). 29 U.S.C. § 401, *et seq.* Moreover, the Union contended, since Pope had been issued, involuntarily, a "withdrawal" card following his termination, he lacked standing as a "member" to sue under the LMRDA.

In the alternative, OPEIU argued that since it had lifted its trusteeship over Local 268 before this action had proceeded to trial, the district court erred by admitting evidence that would permit the jury to evaluate whether the trusteeship had either been imposed, or maintained, for an illicit reason, *i.e.*, in violation of Title III of the LMRDA. 29 U.S.C. § 461, *et seq.* Included within this body of evidence was virtually all of the evidence Pope needed in order to prove -- particularly by the clear and convincing evidentiary standard imposed by the court -- that his termination by OPEIU Trustee Wright was part of a deliberate and concerted campaign by OPEIU to suppress the Title I rights of the Local membership, as well as in retaliation for his having exercised his own free speech right, and right to run for office and to participate in the Local's governance. *See* 29 U.S.C. § 411.

The Court of Appeals' Decision

The court of appeals held that Pope was a "member," as that term is defined in the LMRDA, who was entitled to enjoy the protections of Title I. App. 13a-14a. It held, consistent with the trial court and the jury's findings, that the provision in OPEIU's Constitution governing the issuance of withdrawal cards did "not apply to any member who holds

office in, or is employed by, the international union or one of its locals" and, hence, the Union's issuance of a withdrawal card to Pope was "the equivalent of expulsion from the union." App. 28a.

The court observed that *Finnegan v. Leu*, 456 U.S. 431 (1982), had held that the removal of appointed union officials from office by elected officers did not deprive them of their membership rights or otherwise constitute "discipline" under § 609 the LMRDA, 29 U.S.C. § 529, while reasoning that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election." App. 15a, quoting from *Finnegan*, 456 U.S. at 441.

The court went on to observe that in *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), this Court had subsequently held that "a trustee's authority under [LMRDA] Title III ordinarily should be construed in a manner consistent with the protections of Title I." 488 U.S. at 357. And, whether a trustee's "interference with Title I rights gives rise to a cause of action under § 102 must be judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed and responsive to the will of the union membership as expressed in open, periodic elections.'" 488 U.S. at 354.

The court of appeals observed that this "theme . . . dictate[d] the outcome of both" *Finnegan* and *Lynn*. And, while noting that neither case was on all fours with Pope's case, the court concluded that the underlying goal "of ensuring democracy is furthered by allowing Pope a cause of action under the LMRDA." App. 17a. And, the court held, "Pope is entitled to protection under the LMRDA because he was disciplined in a manner which affected his right to fully

enjoy the rights and privileges of union membership."[5] App. 17a.

The court of appeals rejected OPEIU's argument that once a trusteeship had been lifted, the evidence regarding its imposition or maintenance became inadmissible in a Title I action for damages. App. 21a-22a. The court recognized that if the lawsuit had been brought under Title III, seeking only to enjoin the trusteeship, once it had been lifted "there is no longer any relief to be had." App. 21a.[6] However, the court pointed out, "Pope is not simply seeking to lift a trusteeship or declare a trusteeship invalid after it has been lifted. * * * Rather, this is an action to recover damages for the suppression of Title I rights . . .." App. 21a. Further, the court reasoned that OPEIU's position was untenable:

> If evidence regarding the imposition or maintenance of a trusteeship after it has been lifted were inadmissible, national and international unions could impose trusteeships with impunity, including as a means to suppress Title I rights, and remain immune from legal scrutiny as long as they lifted the trusteeship before the plaintiff has his day in court. The Supreme Court has expressed its view that Title I individual rights are not suspended during a trusteeship. If the OPEIU's position were to prevail, Title III would trump Title I rights.

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[5] In neither *Finnegan* nor *Lynn*, were the officers who were removed from union office also deprived of their membership rights, *e.g.*, the right to attend meetings, to vote, to run for elective office, etc.

[6] In their original complaint, Pope and a number of other Local 268 members had sought, *inter alia*, to have the trusteeship enjoined. However, once OPEIU "voluntarily" lifted the trusteeship, this count in the plaintiffs' complaint became moot and was dismissed.

App. 20a-21a.

REASONS FOR DENYING THE WRIT

Introduction

Although this case was tried by a jury, and despite the fact OPEIU did not except to the jury instructions, its Petition for a Writ of Certiorari is predicated on factual representations which are flatly inconsistent with the findings below. Further, as we shall presently demonstrate, OPEIU has grossly distorted the rulings of lower courts in its attempt to create the appearance of conflicts among the circuits where none, in fact, exist.

I. The Decision Below Neither Conflicts With Any Other Decision Nor Constitutes Interference With The Right Of Unions To Establish Reasonable Membership Rules.

Having unlawfully terminated Pope as part of a deliberate scheme to suppress democracy in Local 268, and to interfere with Pope's Title I right to participate in the affairs of the Local, OPEIU nonetheless contends that once Pope was no longer "employed" by the Union it was required by its Constitution to issue him a withdrawal card. And, once Pope was no longer an active member, OPEIU contends that he lacked standing to sue under the LMRDA to remedy OPEIU's infringements of members' Title I rights, including his own right of free speech, and right to participate in the governance of Local 268.

Suffice it to say that the court of appeals examined the provision in OPEIU's Constitution which allegedly compelled the Union to issue Pope a withdrawal card, and thus to deprive him of standing to sue to redress infringements of the LMRDA, and held that the provision did not apply to Pope;

and OPEIU does not question or seek review of this ruling.[7] The provision in OPEIU's Constitution, like similar provisions in many international union constitutions, requires the issuance of withdrawal cards to members no longer working "at the trade," *i.e.*, for an employer under contract with the Union; *but*, the OPEIU provision explicitly excepts "any member who holds office in, or is employed by, the International Union, [and] any of its Local Unions or Councils . . .." JA 1257. Further, while OPEIU counsel asserts that the Union's "long-standing, consistent, and reasonable interpretation" (Cert Petn at 12) of its Constitution required issuance of a withdrawal card to Pope, the Union introduced no evidence to demonstrate that it had ever previously, much less uniformly, construed its Constitution to apply to individuals like Pope. To the contrary, the record shows that other Local 268 officials were not issued withdrawal cards after they ceased to be employed by the Local. JA 216, 1185-88, 1195-96.[8]

Nonetheless, OPEIU insists that the Sixth Circuit's decision conflicts with *Yerdon v. Henry*, 152 LRRM 3029 (2d Cir. 1996), and *Reich v. Local 30, International Brotherhood of Teamsters*, 6 F.3d 978 (3rd Cir. 1993). In the first place, neither case involved a claim, as here, for unlawful discipline under § 101(a)(5). 29 U.S.C. § 411(a)(5). In *Yerdon*, the Second Circuit summarily affirmed the district court's

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[7] District Judge Matia dissented on the ground that he believed that the Constitutional provision was properly applied to Pope.

[8] Various courts have held that unions may not, on an *ad hoc* basis, make up or apply rules, or constitutional interpretations, to deprive members of their membership rights, including *inter alia*, the right to sue under the LMRDA. *See, e.g., Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980); *Erkins v. Bryan*, 663 F.2d 1048, 1052 (11th Cir. 1981), *cert. denied*, 459 U.S. 989 (1982); *Agola v. Hagner*, 678 F. Supp. 988 (E.D.N.Y. 1987).

dismissal of a lawsuit brought by a former union employee who had quit her job, claiming emotional distress caused by alleged sexual harassment. While the facts showed that she was eventually issued a withdrawal card, the court did not address, much less resolve, any issue involving issuance of that card.

And in *Reich v. Local 30*, the Third Circuit examined closely the Department of Labor's interpretive regulations applicable to the issuance of withdrawal cards and their effect on the eligibility of candidates for union office in a Title IV action. The court held that the Teamsters' constitutional provision mandating the issuance of cards to members who had been unemployed by a Teamster employer for 6 months was neither unreasonable, nor inconsistent with those rules. This holding, and the Sixth Circuit's holding in the instant case, simply do not conflict.

On the contrary, the Labor Department Rule which the Third Circuit carefully analyzed, 6 F.3d at 986, actually supports the Sixth Circuit's decision below. While upholding union rules requiring candidates to be "working at the trade," the Rule provides, *inter alia*:

> Such a requirement should not be so inflexible as to disqualify those members who are familiar with the trade but who because of illness, economic conditions, or other good reasons are temporarily not working.
>
> *It would be unreasonable for a union to prevent a person from continuing his membership rights on the basis of failure to meet a qualification which the union itself arbitrarily prevents the member from satisfying.*

29 C.F.R. § 452.41 (emphasis added). In the present case,

Pope did not quit a job with an OPEIU employer; nor was he laid off or fired by a third party employer; rather, it was OPEIU which arbitrarily terminated him in order to deprive him of his membership rights, particularly the right to run for elective office. No court has ever sanctioned such conduct and the law clearly forbids it.

II. The Decision Below Neither Contradicts *Finnegan* Nor Conflicts With The Rulings Of Other Circuits.

In *Finnegan v. Leu, supra*, this Court held that the termination of an appointed union staff member by a newly elected president did not constitute "discipline" within the meaning of section 609 the LMRDA, 29 U.S.C. § 529, noting that plaintiff's termination did "not impinge upon the incidents of union membership." 456 U.S. at 438. Nonetheless, the Court observed that its "analysis [was] complicated . . . by the fact that § 102, 29 U.S.C. § 412, provide[d] independent authority for a suit against a union based on an alleged violation of Title I of the Act." 456 U.S. at 439. And it explicitly left "open the question whether a different result might obtain where the dismissal was "part of a purposeful and deliberate attempt . . . to suppress dissent within the union," citing *Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973). 456 U.S. at 440-41 and n.11. But, given "the Act's overriding objective . . . to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections," the Court held that "the ability of an elected union president to select his own administrators [was] an integral part of ensuring a union administration's responsiveness to the mandate of the union election" and affirmed dismissal of the plaintiff's action. 456 U.S. at 441.

OPEIU is simply incorrect when it asserts that

Finnegan gives unions *carte blanche* to terminate staff even where part of a deliberate scheme to suppress members' Title I rights. As we have seen, the Court was very careful to leave the door open for different results where necessary to promote Congress' overriding objective of achieving democracy in unions. Indeed, in *Sheet Metal Workers v. Lynn*, this Court subsequently considered the termination, not of an appointed official, but rather of an elected officer, where the termination was ordered not by a newly elected president, but rather by an appointed international union trustee; and in that case, the Court held that the officer's termination constituted a violation of Title I.

Pope's situation was far more analogous to the facts in *Lynn*, than those in *Finnegan*. Of course, in neither *Finnegan*, nor *Lynn*, did the defendant union go so far as did OPEIU in the instant case by depriving the discharged official not only of his livelihood, but also of all priviliges of membership. Moreover, as the jury found below, by clear and convincing evidence, OPEIU and its appointed trustee were engaged in a very deliberate, systematic campaign to undermine democracy in Local 268, to prevent the Local electorate from expressing itself, and to deny them the opportunity to elect a candidate they supported, but whom the parent union opposed -- all in blatant violation of Title I. In affirming, the Sixth Circuit carefully followed the teachings of *Finnegan* and *Lynn* and focused on the "overriding objective" to foster and protect union democracy, taking into account this Court's concern, expressed in *Finnegan*, that unions might "utilize dismissal from union office as 'part of a purposeful and deliberate attempt . . . to suppress dissent within the union." 456 U.S. at 441.

Finally, while OPEIU also claims that the decision below conflicts with rulings by other circuits, it draws our attention only to a line of decisions by the Second Circuit,

anticipated in *Finnegan*, which have held uniformly that where a Title I plaintiff can demonstrate by clear and convincing evidence that her removal from union office was part of a purposeful and deliberate scheme to suppress dissent, she is entitled to relief. *See, e.g., Schonfeld v. Penza*, 477 F.2d 899, 904 (2d Cir. 1973); *Cotter v. Owens*, 753 F.2d 223 (2d Cir. 1985); *Johnson v. Kay*, 860 F.2d 529 (2d Cir. 1988); *Franza v. Teamsters Local 671*, 869 F.2d 41 (2d Cir. 1989). The lower courts did not depart from this line of authority here; rather, they embraced and followed it. *See* App. 55a. And, as we have seen, *supra* at 5-6, the jury was properly instructed to apply this line of authority and OPEIU did not challenge the instruction below.

III. Pope's Title I Cause Of Action Was Not Mooted When OPEIU Lifted Its Trusteeship; And By Upholding The District Court's Admission Of Evidence Relevant To That Cause of Action The Court of Appeals Did Not Rule In Conflict With Decisions Of Other Circuits Or In A Manner That Was Inconsistent with the LMRDA.

OPEIU contends that whenever a union has lifted its trusteeship before an LMRDA action goes to trial, the conduct surrounding imposition and maintenance of the trusteeship suddenly becomes off-limits, beyond the scrutiny of a court or jury. But, the court of appeals declined to buy OPEIU's proffered doctrine on the grounds that to do so would grant unions unfettered license to undermine democratic local union autonomy and the remedial objectives of the LMRDA; to do so, the court observed, would effectively permit parent unions to impose blatantly unlawful trusteeships with impunity, and then lift them, as here, shortly before suits challenging their unlawful conduct were scheduled to be heard. In fact, given pretrial discovery, the criminal docket, and the overall caseload burdening federal courts, by the time ordinary

LMRDA cases work their way to the top of a judge's trial docket, there is an excellent chance the trusteeship will have been lifted in any event.[9] Either way, under OPEIU's postulation of the law, once a union lifts its trusteeship, it would succeed in placing its unlawful conduct beyond the reach of the law.

OPEIU asserts that *Laborers Int'l Union v. Mail Handlers*, 880 F.2d 1388 (D.C. Cir. 1989), and *Airline Stewards & Stewardesses Ass'n v. Transp. Wkrs Union*, 334 F.2d 805 (7th Cir. 1964), conflict with the decision below. However, these two decisions hold no more than what the Sixth Circuit correctly noted below: "When a plaintiff sues for injunctive and/or declaratory relief[,] once a trusteeship has been lifted, obviously there is no longer any relief to be had" and there no longer exists a "case or controversy" under Article III of the U.S. Constitution. App. 21a. These two cases do not, however, support OPEIU's proposition that "questions concerning the validity of the purposes for which [a trusteeship] was imposed or maintained" become moot *in a Title I action for damages* after the trusteeship has been lifted.[10]

Whenever a valid claim has been stated, a claim for which relief can still be afforded *after* a trusteeship has been

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[9] After 18 months, trusteeships are presumptively unlawful. *See* 29 U.S.C. § 464(c). Moreover, competent counsel can always arrange with his union clients to lift trusteeships, as here, just before the law finally appears to be catching up to them.

[10] In *Air Line Stewards*, in addition to holding that the union's termination of its trusteeship mooted the Title III claim for injunctive relief, the court separately held that the removal of an elective officer did not state a claim under § 101(a)(5) where the officer had failed to allege deprivation of any membership rights. The instant case, of course, challenged OPEIU's deprivation of Pope's membership rights. App. 16a-17a.

lifted, simply because that claim is based, in whole or in part, on the validity of the trusteeship does not destroy the "case or controversy;" so long as there is relief that can still be granted, the claim survives the trusteeship's termination. *See, e.g., Carpenters v. Dale*, 118 LRRM 3160 (C.D.Cal. 1985), cited approvingly in *Sheet Metal Workers v. Lynn, supra*, 488 U.S. at 357.[11]

IV. In An Action At Law For Damages, There Was Nothing Improper About Allowing A Jury To Determine Whether A Trusteeship Was Employed As An Illicit Vehicle For Inflicting Injuries.

In its final argument, OPEIU contends that "allowing a jury to decide Title III issues in a Title I damages case after a trusteeship is over risk[s] serious incursions on union self-governance" since the jury could "assess in hindsight the propriety of a terminated trusteeship." Cert Petn at 29. Simply because most prior trusteeship issues have been

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[11] In *Carpenters*, the court ordered an international union found to have imposed an unlawful trusteeship to reimburse monies to the local members and to forego collection from the local of per capita taxes. *See also* 29 U.S.C. § 464(a) authorizing courts finding that Title III violations have occurred, and where the violations have not been fully remedied, to "award such relief (including injunctions) as may be appropriate." Clearly, injunctions were not the only form of relief made available. *See also* 29 U.S.C. § 466: "The rights and remedies provided by this title shall be *in addition to any and all other rights and remedies at law or in equity*." (Emphasis added.)

To the extent that the Tenth Circuit's opinion in *Gesink v. Int'l Ass'n of Machinists*, 831 F.2d 214 (10th Cir. 1987), may have held that damages are not available under Title III, we submit that it is in error. More important for current purposes, however, *Gesink* is consistent with the Sixth Circuit's decision below inasmuch as the Tenth Circuit held that damages are available under Title I to an official wrongfully terminated by a trustee.

reviewed by courts sitting in equity, when assessing whether to award injunctive relief under Title III, does not stand for the proposition that Congress intended to forbid juries from awarding damages in Title I cases where trusteeships were improperly imposed.[12]

In fact, this Court has expressly held that union members suing for money damages under Title I are entitled to jury trials. *Wooddell v. IBEW*, 502 U.S. 93 (1991). Pope sought damages against OPEIU for violation of his Title I rights and he was accordingly entitled to a jury trial. Indeed, OPEIU did not object to his jury request. Thus, while *Wooddell*, and OPEIU's failure to object, are dispositive of this issue which OPEIU seeks now to have the Court review, anew, because the Union also makes a sweeping policy-oriented argument to the effect that Congress intended to forbid juries to consider trusteeship issues, we will address that claim briefly.

When enacting the LMRDA, Congress never suggested that it intended to let unions off the hook for the consequences of unlawful trusteeships. To the contrary, Congress intended to put the brakes on the imposition of abusive trusteeships "used as a means of consolidating the power of corrupt union officers . . . *and preventing the growth of competing political elements within the organization.*" *Sheet Metal Workers v. Lynn, supra*, 488 U.S. at 356 n.8 (1989), quoting from S. Rep. No. 187, 86th Cong., 1st Sess., 17 (1959), emphasis in original. Hence, even if OPEIU's dire

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[12] OPEIU complains that "no court in the Sixth Circuit would have found this [Local 268] trusteeship improper" in light of *Teamsters Local 406 v. Crane*, 848 F.2d 709 (6th Cir. 1990). Cert Petn at 29 n.11. Of course, both the District Court and the Sixth Circuit, itself, did just that in the instant case when rejecting OPEIU's various motions and arguments based on *Crane*.

predictions were to be realized, and juries in future Title I (or Title III) actions for damages are allowed to determine whether parent unions imposed unlawful trusteeships, Congress' "overriding objective" of promoting union democracy would be enhanced, not undermined.[13]

If courts are to promote this objective and prevent autocratic union officials from abusing trusteeships to suppress democratic rights and processes and prevent the growth of competing political elements, courts must be able to consider the conduct of parent unions when imposing or administering trusteeships, whether under Title III or Title I, whether before or after a trusteeship has been lifted, and to hold them accountable for any conduct that may have been unlawful and award damages, when sought, to remedy violations and thus to discourage future misconduct. *See* Comment, *The Trusteeship Imbroglio*, 71 Yale L.J. 1460, 1511-17 (1962); Beaird, *Union Trusteeship Provisions of the Labor-Management Reporting and Disclosure Act*, 2 Ga. L. Rev. 469, 523 (1968).

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[13] While *Wooddell* upheld the right to jury trials in Title I actions seeking damages, inasmuch as Congress used the identical language authorizing the award of "such relief (including injunctions) as may be appropriate" in both Titles I and III, there should be no impediment to juries awarding damages, where sought, in Title III actions either. *Compare* 29 U.S.C. § 412 *with* 29 U.S.C. § 464(a).

CONCLUSION

For the foregoing reasons, OPEIU's Petition for a Writ of Certiorari should be denied.

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